TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 851

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MANLY S. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1927
CERTIORARI GRANTED MARCH 7, 1927

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INDEX

38102—27——1

1 In United States District Court, Eastern District of South Carolina

[Caption omitted.]

Indictment

Filed March 6, 1923

Violation section 253, act February 24, 1919, and section 253, act November 23, 1921

The United States of America, Eastern District of South Carolina. In the District Court

At a stated term of the District Court of the United States for the Eastern District of South Carolina, begun and holden at Florence, within and for the district aforesaid, on the first Tuesday of March, in the year of our Lord one thousand nine hundred and twenty-three, the grand jurors of the United States of America, within and for the district aforesaid, upon their oaths, respectively, do present, that Manly S. Sullivan, late of Charleston County, in the State of South Carolina, on the fifteenth day of March, in the year of our Lord one thousand nine hundred and twenty, was an individual
2 whose legal residence and principal place of business was in the city of Charleston, in the county of Charleston, aforesaid, in said Eastern District of South Carolina, and in the internal revenue collection district of South Carolina, and one who was then and there required by law to make to the collector of internal revenue for said collection district, under oath, a return stating specifically the items of his gross income and the deductions and credits allowed under Title II (Index Tax) of the act of Congress approved February twenty-fourth, nineteen hundred and nineteen, and entitled "An act to provide revenue, and for other purposes," by reason of the fact, which said grand jurors, upon their said oaths, charge to be the fact, that, during the calendar year nineteen hundred and nineteen, he, the said Manly S. Sullivan had a net income in a large amount, to-wit, in the total sum of eight thousand and nineteen dollars and twenty-five cents ($8,019.25) arising as follows, to-wit:

Profits from automobile agency	$3,019.25
Profits from sales of beverages	5,000.00

upon which said income of said Manly S. Sullivan an income tax under said act of Congress then and there became due to the United States from said Manly S. Sullivan in the total sum of three hundred and thirteen dollars and seventy-three cents, one-fourth of which at least should then and there have been paid by said Manly S. Sullivan to said collector of internal revenue; and that said Manly S. Sullivan, on April fourteenth, nineteen hundred and twenty, at

Charleston, aforesaid, in the said Eastern District of South Carolina, then and there still being indebted to the United States on account of said tax in this count mentioned, imposed by said Title of said act of Congress, unlawfully did wilfully attempt to defeat and evade a large portion of said tax in the manner and by the means following, to-wit, said Manly S. Sullivan then and there, to-wit, on said April fourteenth, nineteen hundred and twenty, well knowing all the premises in this count aforesaid, and as overt acts in so wilfully attempting to defeat and evade a large portion of said tax, made under his oath, an income tax return and then and there filed the same with said collector of internal revenue, to-wit, an income
3 tax return stating specifically the items of his gross income for said calendar year nineteen hundred and nineteen to have been as follows, to-wit:

Income from business or profession $3,019.25, and no other; then and there paid to said collector of internal revenue the total income taxes, amounting to thirty-two dollars and eight-two cents ($32.82), shown to be due to the United States by said return, and no more, and there and then, to wit, when so making and filing said income tax return and paying said income taxes wilfully omitted to include in his said return, the full amount of his income on account of profits from sales of beverages; and furthermore, said Manly S. Sullivan had never made any other or different income tax return, in respect to his income tax for said calendar year nineteen hundred and nineteen, to said collector of internal revenue, or to any other proper officer of the Government of the United States, and has never paid to said collector, or to any other proper officer of the Government of the United States, any further sum of money in addition to said sum of thirty-two dollars and eighty-two cents ($32.82), on account of his said tax debt; contrary to the form of the statute of the United States, in such case made and provided, and against the peace and dignity of the United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Manly S. Sullivan, on March fifteenth, nineteen hundred and twenty-one, was an individual whose legal residence and place of business was at Charleston aforesaid, in the said eastern district of South Carolina, and in the internal revenue collection district of South Carolina, and one who was then and there required by law to make to the collector of internal revenue for said collection district, under oath, a return stating specifically the items of his gross income and the deductions and credits allowed under Title II (Income Tax) of said act of Congress approved February twenty-fourth, nineteen hundred and nineteen, and entitled "An act to provide revenue, and for other purposes," by reason of the fact, which said grand jurors, upon their said oaths, charge to be the fact, that during the calendar year nineteen hundred and twenty, he, the said Manly S. Sullivan, had a net income in
4 a large amount, to wit, in the total sum of ten thousand dollars ($10,000.00), profits from his automobile agency and

profits from his business of selling beverages, and that said Manly S. Sullivan then and there, to wit, on said March fifteenth, nineteen hundred and twenty-one, at Charleston aforesaid, in said judicial and collection districts, so then and there being such individual having had said net income for said calendar year nineteen hundred and twenty, unlawfully did wilfully refuse to make the return in this count of this indictment above referred to, or any return whatever, to said collector of internal revenue, in respect to his said income for said calendar year nineteen hundred and twenty; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that said Manly S. Sullivan, on March fifteenth, nineteen hundred and twenty-two, was an individual whose legal residence and place of business was at Charleston aforesaid, in said eastern district of South Carolina, and in the internal revenue collection district of South Carolina, and one who was then and there required by law to make to the collector of internal revenue for said collection district, under oath, a return stating specifically the items of his gross income and the deductions and credits allowed under Title II (Income Tax) of the act of Congress, approved November twenty-third, nineteen hundred and twenty-one, and entitled "An act to reduce and equalize taxation, to provide revenue, and for other purposes," by reason of the fact, which said grand jurors, upon their oaths aforesaid, charge to be the fact, that, during the calendar year nineteen hundred and twenty-one, he, the said Manly S. Sullivan, had a net income in a large amount, to wit, in the total sum of ten thousand dollars ($10,000.00) profits from his automobile agency and profits from his business of selling beverages, and that said Manly S. Sullivan then and there, to wit, on said March fifteenth, nineteen hundred and twenty-two, at Charleston aforesaid, in said judicial and collection districts, so then and there being such individual having had said net income for said calendar year nineteen hundred and twenty-one, unlawfully did wilfully refuse to make the return herein above referred to, or any return whatever, to said collector of internal revenue, in respect to his said income for said calendar year nineteen hundred and twenty-one, contrary to the form of the statute of the United States, in such case made and provided, and against the peace and dignity of the United States.

J. D. E. MEYER,
United States Attorney.

A true bill.

W. T. LESESNE,
Foreman Grand Jury.

March 6, 1923.

In United States District Court

Plea of not guilty

The defendant, M. S. Sullivan, waives arraignment and pleads not guilty in open court, this 18th day of January, 1926.

M. S. SULLIVAN.

Verdict

See page 135.

Sentence

See page 136.

In United States District Court

Bill of exceptions. Settled and filed March 12, 1926

STATEMENT OF CASE

Manly S. Sullivan, Plaintiff in Error, versus United States of America, Defendant in Error

6 Be it remembered, that the above entitled cause came on for trial on the 18th, 19th, and 20th days of January, 1926, at the January term of court held in Charleston, South Carolina, for the Eastern District of South Carolina, before Honorable Ernest F. Cochran, presiding judge, and a jury. The United States appearing by J. D. E. Meyer, Esq., United States attorney, and the defendant appearing without counsel, representing himself and conducting his own case.

Upon the request of the defendant he was tried upon two indictments at the same time. Both indictments growing out of the same transactions. One indictment involving the wilful failure to file an income tax return for the years 1919, 1920, and 1921, in order to evade and defeat the payment of the tax, and the other indictment charging a violation of section 125 of the Criminal Code by making a false income-tax return for the year 1919.

The defendant was duly arraigned, entered a plea of not guilty as to both indictments and the jury was duly impaneled, and thereupon the following testimony was taken on behalf of the United States:

A. R. GOODWYN.

Direct examination by Mr. MEYER:

I am the head of the income tax department for the collector of internal revenue, at Columbia, S. C., having held that position since January, 1920, and filed the records in that particular division of the office. I have the custody of the returns which are filed there. The revenue act of 1918 requires all individuals to file returns with

a net income of two thousand dollars or more for married persons, and one thousand dollars or more for single persons, regardless of the fact that they showed a tax or not; and if they resided, or had their place of business in South Carolina, they would file their returns with me.

The photostatic copy of the return of M. S. Sullivan, 139 Market Street, Charleston, S. C., for the year 1919, introduced into evidence and marked Exhibit # 1, the photostatic copy being certified by
7 the Assistant Secretary of the Treasury under section 882 R. S. The photostatic copy is compared before the jury with the original return of M. S. Sullivan for this year and the photostatic copy is found to be an exact copy of the original.

An additional assessment was made against M. S. Sullivan for the year 1919 and Mr. Sullivan did not file with me any request for an abatement of the additional assessment, nor did Mr. Sullivan pay any additional tax besides the $32.82 paid at the time of filing the original income tax return for 1919. As far as my office is concerned my office has received no protest whatsoever. If my office had received any protest or any request for an abatement of this tax for 1919 I would have known it. Mr. Sullivan did not file any income tax return at all for the years 1920. If any was filed for the year 1920 I would have known it. Tax was assessed against the defendant M. S. Sullivan for the year 1920 and he was notified of this assessment against him and no request for an abatement or any protest in regard to the tax for 1920 was filed at my office. The defendant filed no income tax for the year 1921. If he had filed one I would have known it. There was a tax assessment made against him for the year 1921 and he was notified of this assessment and there was no abatement nor any protest filed with my office by the defendant M. S. Sullivan.

Witness explained net income and gross income.

For the year 1919 and 1920 a person was required to make a return if he was married and had a net income of two thousand, and for the year 1921 a person who was married was required to make a return who had a net income of two thousand dollars, or a gross income of five thousand dollars.

If Mr. Sullivan had made a profit of $5,000.00 from a beverage business in addition to what is shown on his income tax return for 1919 I figure that Mr. Sullivan should have paid $336.12 for the year 1919. Mr. Sullivan only paid the $32.82.

Objection, by Mr. Sullivan, to the testimony. "The district
8 attorney says that I made $5,000.00 on beverages, but he has produced no evidence to show that I made $5,000.00 on beverages."

COURT. He will have to show that. I will admit the evidence for the present. If he doesn't connect it up, it will not be worth anything.

Exception, Mr. Sullivan.

Cross-examination by Mr. SULLIVAN:

Q. Mr. Goodwyn, where are you from?

A. Columbia, S. C.

Q. Columbia, S. C., is your home?

A. Yes, sir.

Q. You live in South Carolina?

A. Yes, sir.

Q. Mr. Goodwyn, this went through your office?

A. Yes, sir.

Q. Did you personally check this?

A. It was checked in the office, and I had it in the files.

Q. You were in charge of the office at the time that went through? You are the head of the office?

A. Is that in 1919?

Q. The one you just went over.

A. Yes, sir. Since 1920 I have been head of that office.

Q. Mr. Goodwyn, were you in charge of that office when the men were sent there—I don't know where they came from—and rechecked this, to see if it was correct?

A. They didn't check it our of our office.

Q. You don't know whether or not that was rechecked?

A. No. That report did not come through our office. The deputy may have checked it, but the report of any additional tax did not come through our office.

Q. Would it go through your office?

A. Not necessarily, no.

Q. Under those conditions, you don't know whether or not this was rechecked?

A. Any additional tax assessed on that, any report of additional tax assessed for that year, did not go through our office.

Q. This was on legitimate business, the tractor business. Is that correct?

A. That is what the return says. I do not know anything about it.

Q. That was for the purchase of Fordson tractors, plows, farming implements? My net income?

9 Mr. Myers objects that Mr. Sullivan is testifying, and that he can only ask questions. Sustained.

Q. I want to ask him if he know*n* that the report is correct, and whether it was rechecked by the Government, and found to be correct, which I know is a fact.

A. That return, those 1040–A, all stay in the collector's office. They are audited in the collector's office. The return as made—I mean the tax shown on the income, is correct, so far as that goes.

Q. That ain't the point I want to bring out. The question I want to ask you is whether or not you know that that was rechecked—that the Government sent me there and checked over my business and found it correct?

A. Not from our office.

Q. Then you don't know whether that is a fact or not?

A. About checking you up? No. I don't know. It wasn't from our office.

Q. The district attorney asked you a while ago whether or not there was an assessment made against me in 1919, 1920, and 1921, and you told him yes. Is that correct?

A. Yes.

Q. Did you participate in making that assessment?

A. No, sir.

Q. Was that done in your office?

A. No, sir.

Q. How do you know this thing was done?

A. The assessment? The Commissioner sent it to us to collect from Washington.

Q. That is all you know about it?

A. Yes.

Q. You did not take any part in making up this statement against me?

A. None whatever.

Q. Getting the figures out of books or bank accounts?

A. None whatever.

Q. You don't know anything about that? It was just simply a piece of paper sent there to your office, and your duty was to collect it?

A. Yes.

Q. And that is all you know about it?

HAROLD ALLEN.

Direct examination by Mr. MEYER:

10 I am from the Internal Revenue Service at Washington and I am familiar with the tax assessment against the defendant, M. S. Sullivan. The usual procedure in reference to tax assessments against an individual is that an assessment is made by the Commissioner of Internal Revenue, not by the collector. The assessment so made is sent to the collector, entered in his records, and it becomes his duty to collect the tax. Assessments were made in this case against the defendant M. S. Sullivan for the years 1919, 1920, and 1921, and the record in the collector's office would show that fact, with the dates, that the defendant was notified of these assessments. Such notice is sent by the collector from his office, and not from Washington. Therefore, Mr. Goodwyn's testimony on this point is the only available testimony except that it is reported by carbon copies of written notices sent to the taxpayer by the collector, which are in the file in my custody. Mr. Sullivan did not file any protest at any time with my office as to any of these assessments. As far as the files and records disclose he did not pay any taxes for his income derived during the years 1919, 1920, and 1921, except the $32.82, paid for the year 1919. If a payment had been made my office

would have been notified, and it has not been notified of any payment but it has been notified to the contrary.

Cross-examination by Mr. SULLIVAN:

Mr. Allen, where are you from?

A. I am from Washington, D. C.

Q. Is Washington your home town? Were you born in Washington?

A. I was not born in Washington.

Q. Where were you born?

A. (Is at first unwilling to answer, but Court directs him to answer.) I was born in Pittsburgh, Pennsylvania.

Q. Oh, you are one of these northern boys——

COURT. That does not make any difference. No comment is necessary.

Mr. SULLIVAN. Mr. Allen, did you make up this assessment against me?

A. No.

Q. You did not?

A. I did not.

Q. Would you mind telling the jury who made up that assessment against me?

11 A. I have already testified that the Commissioner of Internal Revenue made the assessment against you, and makes all assessments.

Q. All right, sir. You have testified that. Would you mind telling the jury who made out the case against me? I guess I had better put it that way. Who got the evidence against me?

Objection, Mr. Meyers, irrelevant. Sustained.

Q. I am just asking him if he knows who got these figures out of the books.

Court allows the question.

Q. What I am trying to ask the gentlemen, who were the men that Washington sent to Charleston to get this evidence to prosecute me and collect this thing. That is what I am trying to find out if he knows.

COURT. Ask him if he knows who were sent to investigate this case. It doesn't make a bit of difference.

A. The case was investigated by various officers of the Bureau of Internal Revenue, one of whom was John F. Clowe, who was then special agent of the Bureau of Internal Revenue. Mr. Clowe was the special agent that I refer to. He prepared the case against you, principally.

Mr. SULLIVAN. He did the clerical work, but he did not get the evidence against me?

A. You are mistaken. He did get the evidence against you. Another Government officer who was interested in that was Mr. Louis Williams. Both the men I have mentioned are in this room. There are several others whose names appear in the record, and as to whom

I know only by hearsay, not having spoken to them, never having seen them. Those two men were the principal Government officers who prepared the case against you.

Q. They were the principal officers? I would like to ask you a question, Mr. Allen: If you were brought up on any particular charge and you were summoned to a room in a hotel, and he was the man that asked you all the questions and told you that he was investigating this case and he was the Government officer—
12 you would believe him, would you not?

A. Of whom are you speaking? I don't know whom you are talking about.

Objection, Mr. Meyer, to question as irrelevant.

Sustained.

COURT. That evidence was admitted—in reference to those assessments, and protest, or want of protest—simply for what it is worth, but it does not prove the assessments or the fact that he should have made a full return. I won't admit it for that purpose—no bearing upon that point. I will charge the jury on that. It is not admissible for the purpose of showing that he ought to have made any return. It is only admissible as a circumstance that when the assessment was made he made no complaint. It is limited to that purpose.

Mr. MEYER. That is the sole purpose of it.

T. A. WILBUR.

Direct examination by Mr. MEYER:

I am the assistant cashier of the Peoples National Bank, and I am familiar with the Dime Savings Bank & Trust Company, of Charleston, S. C., which was merged with the Peoples National Bank in 1922.

Witness identifies an original ledger sheet of the Dime Savings Bank & Trust Company, showing the account of M. S. Sullivan.

COURT. Unless there is no objection to it, you will have to prove that those entries were regularly kept.

Mr. SULLIVAN. I most stren'ously object.

COURT. All right, you will have to prove that the record was properly kept.

Mr. MEYER. Mr. Wilbur, how were the records of the Dime Savings Bank & Trust Company kept? What would you do wh'n a person came and deposited money? What would be done when it was drawn out, etc.?

A. When he was depositing his money he would make out a deposit ticket—it was entered on the journal and on the
13 ledger sheet, and then filed in the file of the day. Checks were handled the same way. This is an original ledger sheet out of the ledger. I took it out of the ledger yesterday. It is the loose-leaf system. It is a genuine ledger sheet of the account of M. S. Sullivan, and it is the only ledger sheet we ever have had of his. Upon the amalga'tion of the Dime Savings Bank with my bank the records of the Dime Savings Bank and this particular ledger

sheet was kept by us, and we continued right along with it just the same as if there had been no change, except the change in the name of the bank and on the stationery; but this is one that was never changed, because there was no necessity for changing it. The Peoples National Bank took over the Dime Savings Bank in 1922. I think it was February, 1922. The first entry starts on this sheet on August 13th, 1920. The account was practically closed out in September and opened again on July 28th, 1922, and that was the time that the Peoples Bank took over the records of the Dime Savings Bank. I was at the Dime Savings Bank, and this record was kept under my supervision, and that is the basis on which I testify that that ledger sheet was the genuine original ledger sheet of the Dime Savings Bank. I absolutely know that this individual ledger sheet was kept in the regular course of business at the Dime Savings Bank, representing the account of M. S. Sullivan. The books are posted every day, and, if errors are found out, they are corrected the day after they are found, and that is done under my supervision, and it was my duty to see that the books were correct, and as far as I know the books were kept absolutely correctly.

Exhibit #2, Ledger sheet, Dime Savings Bank, Account of M. S. Sullivan.

Cross-examination by Mr. SULLIVAN:

Were you with that bank, Mr. Wilbur, at the time those figures were put on that piece of paper?

A. I was.

Q. Did you put those figures on that piece of paper?

A. I did not.

Q. How could you swear that those figures are correct?

14 A. I believe they are correct, because all of our figures are correct, and I have no reason to believe otherwise.

Q. But you yourself did not put those figures on that piece of paper?

A. No, sir; I did not.

Q. You believe that they are correct, but you couldn't take an oath to your God, right now, and swear that they are, because you didn't do it yourself?

A. I wouldn't go that far, in business, but I believe they are correct, as much as I believe any record in the bank is correct. I believe that to be correct.

Q. But you didn't yourself put those figures on that piece of paper?

A. No, sir; I did not, I did not see them put on.

Q. A man goes to a bank and deposits some money, and they give him deposit slips, don't they?

A. Yes, sir.

Q. No deposit slips have been produced, and common sense teaches me that those are just some figures on a piece of paper, and that they are not backed up by anything—because the man they put on the stand can't take an oath to his God that they are correct. He didn't do it himself. Is that correct?

A. I didn't do it myself. No.

Q. But you believe that they are correct? You couldn't swear that they are correct, because you didn't write those figures yourself?

A. No, but I believe they are correct.

Q. To the best of your knowledge and belief they are correct, but you couldn't swear that, because you didn't do it yourself?

A. No, sir.

Q. Nothing but figures on a piece of paper. No deposit slips or anything to show that I actually put that money in the bank. It looks to me, your Honor, that common sense teaches me that is bad evidence.

COURT. The rule is that the books of a bank or corporation or business concern, where they are proven to be kept under the supervision of a man who says that they were kept correctly, are admissible. Of course you can argue upon your view as to the weight of the evidence, but they are admissible for what they are worth. That is the rule laid down by the Circuit Court of Appeals for this circuit.

15 Redirect examination by Mr. MEYER:

Mr. Sullivan did not ever make any complaint to the Dime Savings Bank that they were not keeping his account correctly. Statements of the condition of his bank account would be furnished him from time to time. These sheets were made in the regular course of business and contemporaneously with the transaction as they occurred.

JOHN F. CLOWE.

Direct examination by Mr. MEYER:

I was born at Wilmington, North Carolina, and I have been employed by the United States Government and was working for the Government in 1922, 1923, and 1924, and part of 1925. I am not at present employed by the U. S. Government, but I am working for the Jefferson Standard Life Insurance Co. In 1922 I was assigned to investigate this case in reference to the income tax return of M. S. Sullivan, in company with the revenue agent, Mr. Huffington, and Mr. Jones. We made an examination of all available records which Mr. Sullivan had, which were very few. He personally did not have any records. We asked him to show us any records he had and he said that he did not keep records; that they were dangerous. He said that records were dangerous. We questioned him as to the source of his income and he said, "You can't expect a man to incriminate himself." The first time I saw Mr. Sullivan in connection with this case I believe was in October, 1922. I can refresh my memory as to the date from my report. My report is dated December 30th, 1922, and the examination was made of Mr. Sullivan's accounts on October 3rd, 1922, and subsequent dates up December 20th, 1922. The first thing we did was to call on Mr. Sullivan for records. We asked Mr. Sullivan for his records,

and he stated that he did not have any; that he did not keep any records as they were dangerous and would give trouble. He said that he did not have any business income prior to the year
16 1919. I asked Mr. Sullivan whether his income was derived from the illicit traffic in intoxicating liquors. Mr. Sullivan said, "Well, gentlemen, you cannot expect a man to incriminate himself, can you?" We soon saw that we could not get any information or any records that Mr. Sullivan had. Therefore, we went to the various banks in town; and I personally served them with subpoenas to produce all records pertaining to M. S. Sullivan's accounts; which they did. We went through these records, and I took a list of all deposits and withdrawals for the years that we were investigating; that is, the years 1917, 1918, 1919, 1920, and 1921.

Mr. SULLIVAN. Is this gentlemen offering that as evidence?

COURT. He hasn't offered it yet. When he offers that I will hear what you have to say.

Mr. MEYER. He is just using that to refresh his memory.

COURT. His report is not yet in evidence. He can look at his report to refresh his memory.

Mr. MEYER. Mr. Clowe, in what banks did you find that Mr. Sullivan had accounts for the years 1919, 1920, and 1921? We will confine our evidence to those three years.

A. Citizens Bank, Enterprise Bank, and the Dime Savings Bank; all of Charleston, S. C.

Q. As a result of finding these accounts in the banks, what did you do?

A. We again saw Mr. Sullivan, and asked him if he had made any deductions that he wanted to take off of them—of these bank accounts. He asked for an extension of time, which I granted him. He said he would get invoices and the information necessary to compile his returns. At the end of ten days we again saw Mr. Sullivan and he asked for five days more, which we gave him. At the expiration of these five days we still could not get any further information from him. He did not ask for any further extension of time. I do not know whether or not any further extension of time was ever given him, but I do know that we never did get anything from him. Nothing that would assist me in the examination to determine his income. He did not tell me that any of that
17 money we found in the banks had been given to him as a gift, and he did not tell me the source of any part of that money, except that he said that part of it was the proceeds of the tractor business—the automobile and tractor business that he was in. I asked him for further information, but he did not give me any, and he simply told me—well, that as to certain operations, "you couldn't expect a man to incriminate himself," and he would give us no further information as to the other income which showed on the bank books. I gave Mr. Sullivan every opportunity to explain these large amounts of money in the banks and he did not explain them. He

did not make any statements to me as to the bank accounts being incorrect. He did not say that they were correct, and he did not say that they were wrong.

Objection, Mr. Sullivan.

COURT. You can ask him about them when you cross-examine him. He says you didn't admit they were either correct or incorrect.

Cross-examination by Mr. SULLIVAN:

Mr. Clowe, where did you ever see me before?

A. I have seen you a number of times, Mr. Sullivan, and while we were examining into this case, I saw you—I think it was on three different occasions, in a room at the St. John's hotel.

Q. Who else was in that room?

A. Mr. Huffington, the revenue agent, and Mr. Jones, a revenue inspector, at that time, and I, at each interview.

Q. How many interviews did you have with me?

A. I think it was three.

Q. You had three interviews with me?

A. Yes, sir.

Q. Mr. Clowe, it was your business, or it was at that time, to investigate income tax causes. Is that right?

A. Yes, sir.

Q. You claim that you, Mr. Huffington and Mr. Jones were at these interviews? Did you work together or individually?

A. Together.

Q. You worked together?

A. Mr. Jones wasn't actively engaged on the case. He was called in at the interviews and was present at the interviews. He did the details of it, but not all.

18 Q. To everything there must be some head. Who was at the head of this investigation?

A. I was.

Q. You were? Your honor, would I be in line if I asked for the reports of these gentlemen to be produced to see who was at the head of that investigation?

COURT. What bearing would that have?

Mr. SULLIVAN. I will bring out some evidence a little later that will, I believe, be very serious.

COURT (to witness). Have you got any reports?

A. I have copies here.

COURT. If the Government has no objection. Of course, the reports of the officers are confidential records of the Government and if the Government objects to it, it might not be admissible.

Mr. Meyer states that he wishes to give the defendant a fair and honest trial, and has no objection to the reports being produced.

A. (Reports are produced.) That is my report, and this is a joint report.

Mr. SULLIVAN: Mr. Clowe, suppose you just tell us who those reports are signed by?

A. One report is signed by me. The other report is signed by Revenue Agent Huffington and me jointly.

Q. You claim that all three of you were present. You told the solicitor awhile ago that all three of you were present at the time you called on me. Tell the solicitor, or the jury, whether you called on me, or whether you summoned me to a room in the Argyle Hotel.

A. I summoned you to a room in the St. John Hotel.

Q. I deny that you summoned me.

COURT. You can't testify now. You can ask him questions. When you go on the stand you can testify. Just interrogate the witness in a proper manner.

Mr. SULLIVAN. Do you claim that you spoke one word to me in that room at the Argyle Hotel, one word?

A. I didn't ever see you in the Argyle Hotel.

19 Q. St. John's. I made a mistake.

A. Yes, sir, I was present at every interview and questioned you.

Q. You questioned me?

A. At the two interviews—I certainly did. That was my business, and I did it.

Q. So help me God, I never saw you——

COURT. You can't testify that way. When you testify, it must be under oath.

Mr. SULLIVAN. You claim that you examined me in that room? That is your claim, is it?

A. I do.

Q. Now, Mr. Clowe, you were sent out—it is your business to go out and investigate income-tax cases and to make these people pay up? This is right, isn't it?

A. Yes, sir.

Q. Would it be out of line, your honor, if I asked him what the procedure is in getting up a case on a man, and what privileges his client would have?

COURT. You can ask him how they proceed.

Mr. SULLIVAN. How do you proceed to get it up?

A. The procedure is different in every case, practically.

Q. According to who the man is? Whether he is a bootlegger or is in an honest, legitimate business?

A. That has a good deal to do with it.

Q. A bootlegger wouldn't be given as much time?

A. Absolutely. I gave you two extensions of time, one of five days, and one of ten.

Q. You claim that you gave me ten days? That is what you told the solicitor—to make a report for three years. Is that right?

A. I gave you fifteen days altogether.

Q. Ten days the first time?

A. I think it was either five the first time, or ten the first time, or vice versa—fifteen days altogether.

Q. That was the time that you allotted a bootlegger for getting together an expense account for three years. Is that right?

A. I would have given you further time, but you told me at the last interview at the St. John's Hotel that you couldn't get the information together. So I decided to close the case, which I did.

Q. You came back then, you claim, and when you called on me the second time, or when I was summoned back to that hotel, you gave me an additional five days?

A. Yes, sir.

Q. Total time of fifteen days to get together all of the expense accounts of all business that I had transacted in three years? That is correct, isn't it?

A. I think the first time, when we first started it, you were out of town. I got your brother-in-law, or somebody, the fellow that had charge of your Market Street place. He told you about it—at least—he said he did. That was in October. The case was closed in December, which is about three months' time that we were working on the case off and on, and I presume that you had knowledge of it.

Q. You presume that I had knowledge of it? But you claim to be the head of this investigating committee, but you didn't serve notice on M. S. Sullivan that he must come up and show any accounts or anything of that kind, did you?

A. I certainly told you of it, up in the room at the hotel.

Q. But not those two or three months ahead, that you talk about? You claim you told an employee of mine?

A. I never could get you.

Q. What we want to get is facts, I believe?

A. Yes, sir.

Q. That is a fact, ain't it? The fact is, you gave me ten days from the time that you first spoke to me and then an extension of five days? That is the substance of it, isn't it?

A. I gave you the exact amount of time that you asked for. I recall that distinctly.

Q. Well, I think I can deny it, so it is all right. I wish you could explain to this intelligent jury just how you proceed to arrive at a man's income-tax assessment.

A. Well, in this particular case, we first tried to get the books—found that there wasn't any books. We got information then from the various records, bank records—examined the courthouse records, and the custom-house records—the records in the office of the collector. That is where we got our information.

Q. Then what?

A. Then we compiled it. We compiled it and showed you the result of our figures.

Q. You went to the three banks in which I had done a little business for three years, and you took these figures and you added them together, and you didn't give me any chance to file an expense

21 account against that, for three years—just like a tractor or a carload of tractors didn't cost me a dime—just like my tire business didn't cost me a dime—just like it didn't cost me 10 cents to live?

A. That is exactly what we had the interview for: To give you that opportunity, and you said you would get the records, which were never produced.

Q. Couldn't do it in fifteen days. Couldn't be done.

COURT. Don't testify. Your time will come.

Mr. SULLIVAN. I didn't get a chance to file any expense account and at the time that you took my bank books of these various banks, my deposits—it was immediately after the war. It was when the American dollar had a national purchasing value of twenty cents. You can't deny that, at the time you took that?

COURT. Just ask the question.

Mr. SULLIVAN. I didn't get a chance to file any expense account against that, but you took—you claim you took the deposits from what banks, may I ask?

A. The Enterprise, the Dime, and the Citizens.

Q. I would like to ask you one or two questions here: Was the Citizen's Bank's doors locked and closed? Was that bank a bankrupt at that time?

A. Bankrupt, but we had access to all records.

Q. You took that evidence behind locked doors, didn't you?

A. Well, I don't know whether the door was locked or not; but the bank was closed, not open for business. I don't know what the trouble with the bank was.

Q. You also took that evidence from the Enterprise Bank, you say?

A. Yes, sir.

Q. Was that bank's doors closed then?

A. Yes, sir.

Q. Was it bankrupt?

A. The bank was not doing business.

Q. Did you know at the time that you took those figures off of those books that the president of the bank, the directors of that bank, were being prosecuted for crooked work?

22 COURT. That wouldn't be admissible. We are not trying them. I may say for your benefit, Mr. Sullivan (you are not a lawyer) that this evidence as to what was found in those banks has only been admitted here on the theory that they called your attention to these bank accounts and that you didn't explain them. You may question him on that line; but whatever the officers of the bank may have done, doesn't make any difference. The question is whether you had the deposits there, and if you had then there, whether that was income or not. There has been no evidence here as to the amount of those deposits. I haven't admitted anything of that sort; and I may say for you, that I would not allow this witness

to testify what the amount of those deposits was, because he doesn't know that—unless you choose to bring that out.

Mr. MEYER. We have already introduced the amount which was in one bank, and we do expect——

COURT. I understand you propose to follow it up by the other banks. I am alluding now to the fact that this witness has not been allowed to testify as to what amount he found at the banks. That is not admissible. All that he can testify to, is that he called it to Mr. Sullivan's attention that these deposits were there, and that he give you further time, and that you didn't go any further.

Mr. SULLIVAN. I have no right at this time to deny that he said anything to me? You said before, Mr. Clowe, that it was your business to make people pay their income tax? It was your business at that time—is that right?

A. Yes, sir. Not to make them pay it, but to get up the figures and information on it, and submit.

Q. Christ said, "He who is without sin, let him cast the first stone"——

COURT. You must ask the question. I am going to permit you to testify, if you desire, and then at the end of the case, when it goes to the jury, you can make an argument, and you may read or quote from the Scriptures in your argument, if you desire; but this witness is not here to expound the Scriptures to us.

Mr. SULLIVAN. It was your business to get this up?

A. To get up information, and submit it.

Q. Make them pay?

A. No; I didn't make them pay.

Q. That was your business to get these figures and
23 statements, to make people pay?

A. I got up the showing, and submitted them to the department in Washington, and it was up to the collector to get it if he could.

Q. You always pay your debts, don't you?

A. Well, I have some that I haven't paid.

Q. I was just going to ask you about one. Did you ever pay the J. B. Carroll Co.?

A. I have, most assuredly.

Q. Very recently?

A. No; over four years ago, my dear sir.

Redirect examination by Mr. MEYER:

After I had given Mr. Sullivan ten days within which to explain these bank deposits, he told us that most of the firms that he had done business with had gone out of business. He stated that most of the firms that he had done business with had gone out of business, and it was for that reason that he asked for an additional five days. I granted him the additional five days' time, and he did not give me any explanation as to why he was unable to obtain it at the end

of these five days, nor did he request me for any additional time to get up this information. He did not give me any assurance that if I had given him a further extension that he would do anything more than he had already done. Mr. Sullivan did not at any time claim that these figures on the bank deposits were not profits. I did not ask him that direct question, but we did ask him for an explanation of these deposits; and at that time we assumed that the income was derived from the whiskey transactions, and he said that he could not incriminate himself by giving information along that line. We explained to him that the evidence given in an income tax investigation couldn't be used against him in any criminal proceeding; but he didn't seem to believe us, and wouldn't give us any further information. We informed him of those rights.

A. W. LITSCHGI, Jr.

Direct examination by Mr. MEYER:

I was born in Charleston, S. C., and I am at present
24 located at Tampa, Fla. I have had eight years' banking experience with the Citizens Bank, of which bank I was the cashier, and afterwards became one of the liquidating agents of the bank examiner. I was also the liquidating agent for the Enterprise Bank. I am thoroughly familiar with the bank records of the Citizens Bank of Manly S. Sullivan, and I have the original records with me. I was cashier at the time that these records were made—the usual custom is the loose-leaf system of keeping records of the bank's deposit accounts. The deposits are handled by the teller, who properly checks and balances them, and then they are turned over to the bookkeeping department, who posts from the deposit ticket or original entry to the ledger sheet, such as these—giving the dates of the deposits, as well as the amount. Every day the bookkeepers of the bank balance their books for the day's operations, and—it depends upon the custom of the bank—weekly, semimonthly, or monthly—to balance all deposits accounts, so they can be verified against the general ledger account kept by the cashier of the bank. These account sheets which I have of the defendant Manly S. Sullivan are the regular entries kept in the establishment of the Citizens Bank during the regular course of the business of that bank and these sheets were made simultaneously with the transactions as appears upon them. The sheets were made when the account was opened, but the entries are posted simultaneously as they go over the counter of the bank.

Mr. SULLIVAN. Is that being offered as evidence now?

COURT. He is laying the foundation for it. He has got to prove it is properly kept before he can offer it.

WITNESS (continues). These records were made and kept under my supervision, and there are no errors to my knowledge in these records, and if there were errors made during the course of the handling of those sheets corrections would normally have been made the day

the error occurred, but at least within the semimonthly balancing of the accounts, at which time checking is made for any errors. Monthly statements to the depositors are made for every active account in the commercial department of the bank. There were no objections or criticisms of those accounts made to my bank; if they were made, the errors or corrections would have been made on those original sheets if found to be incorrect. If found to be incorrect, errors would show on the sheet, and the corrections also. These records were made contemporaneously with the facts, and they were made under my supervision, and I know them to be the original, genuine records of the Citizens Bank.

The Government offers in evidence the original ledger sheets of the Citizens Bank of the account of Manly S. Sullivan, covering the years 1919, 1920, and 1921.

Objection, Mr. Sullivan, on two or three different grounds. First, that the evidence from those sheets was obtained from a bank behind locked doors, which was defunct and closed, and shrouded in great mystery. There was lots of talk about the crooked dealings of that bank——

COURT. There is no evidence of that before, and I don't know that it would be admissible. State your next ground. I understand that.

Mr. SULLIVAN. The next ground is a very serious ground. I hold that either those sheets or that information was taken from the books of that bank by a man named Huffington, a United States agent, a man who is a bigamist——

Objection, Mr. Meyer.

COURT. There is no evidence of that, and you can't make testimony that way. The question is whether the records kept by that bank are admissible. As to Mr. Huffington, we will hear what you have to say when he goes on the stand—if he does. It wouldn't make any difference how the evidence is obtained which is here. The rule is that the method of obtaining evidence does not make any difference if the evidence is here, but as far as that goes, the agents of the department have a right to examine these banks and require of them to give them that evidence. It would not make any difference what the condition of that bank was. If you can show that these entries are wrong, that is a different matter. I overrule the objections. The evidence will be admitted as properly proven records of the bank.

Exception, Mr. Sullivan.

26 Exhibit #3, account of M. S. Sullivan, Citizens Bank.

WITNESS (continues). I was also the liquidating agent of the Enterprise Bank, and as the liquidating agent of the Enterprise Bank I have the custody of certain records of the Enterprise Bank. I identify the record of the Enterprise Bank of Manly S. Sullivan, which was turned over to me as an original ledger sheet of the Enterprise Bank.

Account of Manly S. Sullivan in the Enterprise Bank marked for identification.

WITNESS (continues). The Citizens Bank kept a record of paid certified checks, and I find from the original records of the bank that on October 18, 1919, there was a certified check in favor of Allen Walz for two thousand dollars, the maker of the check being Manly S. Sullivan. This book in which this entry was made was also kept under my supervision and was correctly kept in the usual course of business. On September 11th, 1920, Manly S. Sullivan bought a cashier's check for five thousand dollars payable to J. M. Hanley. On August 14th, 1920, a check made by M. S. Sullivan was certified in favor of Dwight Hughes, cashier, in the sum of $4,505.62.

Objection, Mr. Sullivan, that the witness was introduced as the cashier of the Citizens Bank and that he worked for the Citizens Bank, and was only called in to adjust the affairs of the Enterprise Bank, and he didn't keep those books.

COURT. He said they were kept under his supervision and in the ordinary way.

Mr. SULLIVAN. He did not work there.

WITNESS (continues). These books are the original records of the Citizens Bank, of which bank I was cashier.

COURT. That is what I thought. It was the other bank that he didn't know anything about, but this the bank I understood him to say he was cashier and afterwards liquidating agent. Is that correct?

27 A. Yes, sir. These are Citizens Bank books, and not Enterprise Bank books. On May 11th, 1921, is a certified check for Manly S. Sullivan payable to the Peoples National Bank for three thousand dollars.

Cross-examination by Mr. SULLIVAN:

Mr. Litschgi, these books from which you have just read to the district attorney the records of those certified checks, are those original books of that bank?

A. Yes, sir. The only record that that bank keeps of certified checks. It shows the purchaser and to whom the check was drawn, and also when the check was paid.

Q. That is the only record that the bank has?

A. Only record.

Q. The sheets that you verified—you didn't produce those in the form of a book—just simply came in here with sheets of paper with figures on them, not entries by anybody, or anything else. I want to ask you: Did you or not write those figures on those sheets of paper?

A. Those sheets are used in a bookkeeping machine. There is no handwriting. That is done by a typewriter, a bookkeeping machine.

Q. Did you or not manipulate that machine to make those sheets?

A. No. The bookkeeper of the bank does that, under my supervision.

Q. You didn't do that yourself?

A. I wasn't the bookkeeper.

Q. Could you take an oath and swear that they are correct?

A. I can, to the extent that the books of the bank balance, and that your credits and debits being a part of the entries of the bank, if the books balanced, they must be correct; and in the absence of any information to the contrary, it is to be presumed.

Q. It is to be presumed that it is correct—but you couldn't swear it is correct?

A. I can't swear that the thing is correct, if by that you are trying to infer that I didn't make those myself.

Q. That is right. You only presume, because the bank made a clearance that day, and those days, that it was all right; but you yourself didn't write those figures on that paper. Is that the only form that banks keep books with?

28 A. That is the ordinary banking practice. Now, as to the form, the question of personal preference—but that is the usual banking form, bank practice—deposit accounts.

Q. Are those original sheets, or are those copies given to the Federal agents?

A. Those sheets I just handled were the original sheets of the bank record of your account.

Q. Those are the sheets from which these officers copied these figures on which my income tax was built up so high.

A. Those are the sheets from which they got their figures. As to the latter part of the question, I can't answer that.

Q. Were you present when they got those figures?

A. The papers were served on me, and after they were served, they had the privilege of reading the record of the bank, which they did.

Q. And they just walked in and took charge, and wrote down any figures they wanted?

A. No; they walked in and served the papers, and after the attorneys for the bank passed on the papers, they were allowed to proceed, and not until then.

Q. But they did walk in then and took charge of those things? They didn't call you in, and say, "Is that correct," or "Is this correct." They could have written down millions of figures on their notebooks, or whatever they used, for all you know?

A. I never have seen the record.

Q. Neither did you see him take the record from the papers.

A. I saw two gentlemen in the bank, reviewing your account, but as to what records they took, I can't answer.

Q. You will admit that they could have written anything down there?

A. Well, I wouldn't think a Government employee would do otherwise than what he was told to do.

Q. But you will admit they could have?

A. Of course it is possible.

Q. You didn't stand there and see them take figure for figure off that book?

A. No; I was not interested.

Redirect Examination by Mr. MEYER:

29 My original records were not tampered with by anyone. When the agents asked for the accounts of M. S. Sullivan I showed them the active sheets in the bank. They simply referred to the transfer file and the sheet from which they completed or filled up to get the continuity of the account for the period they were investigating. We have a file and they are filed there alphabetically. These sheets which I have brought here to-day are the original records of the bank and they are the correct records which govern the bank in its conduct of its business with Mr. Sullivan; it would be rather difficult to tamper with the books, you would have to change the whole thing. As to the cashier's checks, they would not necessarily appear on this ledger sheet, as he may have bought cashier's checks with cash, or a valid check on some other bank, certified or otherwise. I do not know where the money came from for the cashier's checks, but the certified checks came out of his deposit account.

Recross-examination by Mr. SULLIVAN:

Mr. Litschgi, I want to cover the same thing that the judge did. The certified checks that you read out here awhile ago, was money that I was drawing out of the bank and paying out, wasn't it?

A. Yes, sir. It was your check on the bank, decreasing your account that much to pay somebody else.

Q. I understand. Thank you.

PIERRE STONEY.

Direct examination by Mr. MEYER:

I am employed at present at the Peoples National Bank of Charleston, S. C., and in 1921 I was assistant cashier of the Enterprise Bank. The sheet of the Enterprise Bank identified by Mr. Litschgi a few minutes ago is the original record of the account of M. S. Sullivan with the Enterprise Bank on June 7th, 1921, to November 1st, 1921, the day the bank closed. This is the close of business, October 21, 1921. This account was made by the teller, before it goes to the bookkeeper. The first deposit here is on June 7, 1921, for

30 $825.00. The account was made in the regular course of business. It was made under my supervision. I posted it. It was received by me from the tellers and I was bookkeeper at that time. I was assistant cashier but I had charge of the books at that time.

Offered in evidence.

Objection, Mr. Sullivan, on the grounds that the evidence was taken from a defunct bank, in which the president and directors were prosecuted, and some plead guilty.

Overruled.

Exception, Mr. Sullivan.

Exhibit #4, Account, M. S. Sullivan, Enterprise Bank, June 7, 1921, to Nov. 1, 1921.

WITNESS (continues). Mr. Sullivan did not make any complaint to me nor to any one else to my knowledge about his account being incorrect. Monthly statements were mailed out to each depositor.

Cross-examination by Mr. SULLIVAN:

Mr. Stoney, were they mailed out on request?

A. Only the out of town ones were mailed, and only those by request; but we had them there at their call.

Q. The district attorney just produced a sheet of paper, that doesn't carry your signature or anybody else's signature. I want to ask you if you wrote those figures on that piece of paper?

A. No, the posting machine wrote them; but that is one that I recognize, one mark on that sheet, that I know I handled the account.

Q. You handled that one account on that sheet?

A. No, sir. I was bookkeeper between those dates, June 7 and November 1st, 1921. I was bookkeeper at that time.

Q. You actually operated the machine that put them on that paper?

A. Yes, sir. I was not absent a day during that five months.

Q. So far as that one sheet of paper is concerned, you claim that that one sheet is correct: that you know it is correct, because you did that yourself?

A. Yes, sir. Sheet No. 1, marked No. 1, it is the original sheet.

31 Q. That is the original sheet from the bank?

A. Yes, sir.

Q. Were you with that bank when Mr. Huffington and other officers came in with the proper authority and demanded to see those books to get my accounts off of it?

A. No, sir.

Q. You were not there at that time?

A. I left there on June 20th, 1922.

Q. Of course you don't know who was in charge of the bank at the time that they took them?

A. No, sir.

Q. One sheet you can verify that that is correct. The rest of them you can't verify, because you didn't do them yourself?

A. Not until I see them. If I went over the books between those dates I kept them, and I could swear that those were at the time I kept the ledger, that those were my postings.

Q. Your own personal work?

A. Yes, sir.

Q. I see.

JOHN F. CLOWE, recalled.

Direct examination by Mr. MEYER:

In my examination of the affairs of the defendant, Manly S. Sullivan, I examined Exhibit # 2, which is the account in the Dime Savings Bank & Trust Company, and the deposits for the year 1920 amounted to $5,009.15. The total withdrawals for the year 1920 were $4,509.83, leaving a balance of $199.32 at the end of the year 1920. I also took into consideration the bank account of the Enterprise Bank for the year 1921, which is Exhibit #4. There was a total deposit at that bank of $7,835.90, and withdrawals amounting to $7,172.88, leaving a balance of $663.02. In my examination I also took into consideration the accounts of the Citizens Bank for the years 1919, 1920, and 1921. In this bank for the year 1919 the defendant deposited $70,932.53, and withdrew $69,558.18, leaving a balance of $1,374.38. In 1920 in the said Citizens Bank the defendant made total deposits of $50,335.21, and withdrew $50,374.57, leaving an overdraft of $39.36 at the end of the year. For the year 1921 the defendant made a total deposit of $68,618.56, and his with-
32 drawals amounted to $67,746.53, leaving a balance of $872.03.

The total deposits made by the defendant Manly S. Sullivan for the three years 1919, 1920, 1921, in all three banks amounts to $202,731.35. These original bank sheets which I have in my hands and which have been introduced by the Government in this case were seen by me before at the Citizens Bank building on King Street. I did not alter or make any changes on these original sheets. They appear to be the same today as they were when I first saw them. The defendant Sullivan told me that he did business with the Molen Plow Company, the Ford Motor Company, and the International Harvester Company. He said that there were others that were out of business and he couldn't get the records; and he made no attempt to get the records of these people.

Cross-examination by Mr. SULLIVAN:

Mr. Clowe, to look at my bank deposit, you would think that I was Mark Hanna?

A. I don't know Mark Hanna.

Q. He was a great financier—lots of money. You totaled it all up and you found that I deposited $200,000.00. You claim that you made up this tax report against me, but in making it out you only found at that time that I deposited $189,000.00. Tell the jury how comes that difference between $189,000.00 and $202,000.00.

A. I only did what?

Q. What you made out against me and assessed me on was $189,800.30?

A. I don't know what they assessed you. The only thing I know anything about is what I actually did myself.

COURT. I want to advise you, Mr. Sullivan, because you are not aware of your legal rights. There has been no evidence offered

here by the Government on what the amount of your assessment was, and if it were offered, I should rule that that would not be admissible against you in a criminal proceeding. But if you go into it and open up the door, you may open the door to the Government to put in that assessment. You can leave it—that is for you; but I want to advise you that I will not permit the Government to
33 show what that assessment was against you in this case. If they sue you on the civil side, that is a different matter.

Mr. SULLIVAN. I thank you, your honor. In 1919, how much did I deposit? What was my total deposits?

A. I think it was $70,932.53.

Q. That was my total deposits for that year?

A. All we could find.

Q. At the end of the year, Mr. Clowe, when this business was wound up, when a man's time comes to make his return for income tax, all that poor old Sullivan had left in the bank was $1,600.00?

A. We were not interested in how much you had in the bank each time. We were interested in your income, and it was up to you to you to show your expenses—which you didn't do, Mr. Sullivan.

Q. And at the end of the prosperous year of 1920, how much did I deposit?

A. Your total deposits for that year were $55,334.36.

Q. But yet, at the end of the year, when the time came to make the income tax return, according to your own statement, and your own figures, I owed the bank $39.36?

A. I wasn't interested in that. According to the record, yes, sir.

Q. How much money did I deposit in 1921?

A. $76,454.46.

Q. My total deposits for the year 1921, but according to your own statement and figures, when the first of the year came around and the time came to make out the income tax return, and pay the Government what you owe them, all Sullivan had in the bank was $872.03? Is that correct?

A. I don't know whether that is the exact figure. I can look. According to this record, yes, sir.

Q. According to your own records, I was just one step in front of the sheriff all the time. Is that correct?

A. I don't know how far ahead of him you were.

Q. The facts and figures show you have brought out.

A. According to that record, it shows that you had that much money.

Q. But you made up this statement and wanted to collect $62,000.00; you wanted to collect that from poor old Sullivan; but in the three years in which you wanted to collect that money, all poor old Sullivan had was $2,472.00. Look at your figures and see if that ain't
34 right. That is all I had. I didn't know you were going to the banks and go over my bank accounts—God knows I didn't.

(Court checks him.)

That is correct, isn't it, according to your own figures? $2,472.00 was all I had?

A. According to the deposits and withdrawals in the banks, according to the figures in the banks, that is correct.

Redirect examination by Mr. MEYER:

At the time that I had that interview with Mr. Sullivan at the hotel, and I called upon him for an explanation he did not talk to me as he is talking to-day. He said that he would get the information together, but he never did, and he did not offer to help us or do anything to give him credit for any deductions; it was not incumbent upon us to find out—to get the information. We were looking for income. He did not write me any letter asking me for more time nor offering to give me any information. If he ever wrote me any letter I did not get it.

Recross examination by Mr. SULLIVAN:

Mr. Clowe, at the time that you was getting this evidence together on me, did you know that I was a bootlegger?

A. I never bought any from you myself, but only hearsay.

Q. You didn't know whether I was a bootlegger or not?

A. I knew that you had been tried on several occasions.

Q. You knew that I had been tried on several occasions?

A. I think you had been. I think you had done one term in the pen for bootlegging.

Q. You are a little ahead of your game. I served that time in 1924, and at the time you took this thing, I had never been convicted of bootlegging——

COURT. Just ask the question.

Mr. SULLIVAN. You assumed that I was a bootlegger?

A. From information: yes.

35 Q. You took that attitude—you got these figures along the line that I was a bootlegger. Is that right?

A. It didn't interest me what you were.

Q. But you did proceed along the line that I was a bootlegger?

A. Well, I made several other investigations in Charleston at the same time, and the same procedure was had in every case.

Q. The same procedure was had in every case?

A. Absolutely, where the parties concerned didn't have books and records.

Q. But you assumed that I was a bootlegger, and you proceeded along the line that I was a bootlegger; yet I had been never tried and convicted—never tried or convicted——

COURT. It doesn't make any difference whether you were tried and convicted. The question is whether you had this income, and it doesn't make any difference whether you made it lawfully or unlawfully. The only question is, Did you make that income? Was that income there?

L. A. JONES.

Direct examination by Mr. MEYER:

I am an internal revenue agent, investigating income tax returns, and I have been employed by the Government and working in South Carolina since Oct. 1, 1921. I was present at an interview with Mr. Clowe and Mr. Huffington and Mr. Sullivan. Mr. Huffington and Mr. Clowe had Mr. Sullivan up at a hotel inquiring about his records, and Mr. Sullivan stated that he had no records; had not kept any; and it would be impossible for him to give us any information. He asked for an extension of time, which was granted. Mr. Sullivan also stated that he did not keep any books or records, because records often got a man into trouble, and he was asked about his source of income—whether it was bootlegging or not, I don't know now; but he said that you couldn't expect a man to incriminate himself. Mr. Sullivan asked for an extension of time in which to assemble information, and it was granted. Just how many
36 days I don't know. I was present at two interviews. At the second interview I think that they told Mr. Sullivan that they would have to put a tax on it; that he had not submitted the information and he did not have any records, and they would have to use such records as they had. To the best of my knowledge, Mr. Sullivan was told that he would be assessed on his bank accounts; that the tax would be assessed against his bank accounts. He did not make any explanation of any of his withdrawals, nor did he make any explanation of his deposits. He was given an opportunity to do both. He did not furnish any information that I can recall, and as well as I remember Mr. Sullivan left and said that this information was scattered—he was doing business with several concerns—several had bond out of business or gone into bankruptcy, and he was doing business with concerns from Canada to the Gulf. I won't be positive as to that, but that is how I remember it now. Finally Mr. Sullivan stated that he had no records. I do not know what action Mr. Huffington took on the case. He had the case; whether he had any more interviews with Mr. Sullivan or not I don't know. At the end of the second interview Mr. Sullivan did not ask for any extension of time that I know of.

Cross-examination by Mr. SULLIVAN:

Mr. Jones, ever seen me before?

A. Yes, sir.

Q. Where did you see me?

A. In the St. John's Hotel, in a room.

Q. Who was in that room where you saw me?

A. Mr. Huffington and Mr. Clowe.

Q. Just a moment ago you made a statement that Mr. Huffington was handling that case, didn't you?

A. Income tax—computing incomes.

Q. That is right, sir. That is right, sir. That is right, sir. Mr. Huffington was handling that case. Did you talk to me, Mr. Jones, in that room?

A. I don't know whether I did. I don't know that I asked you one question.

Q. Would you mind telling the jury who did all the talking to me?

A. I couldn't say. I think both Mr. Clowe and Mr. Huffington, was well as I remember.

37 Q. But Mr. Huffington was handling the case. You have testified to that. If you were going out to make up a man's income tax, tell the jury just how you would proceed.

A. Well, I would try to get the net income, and from that I would get the tax—deduct his credits and personal exemptions, and get the tax.

Q. You would give him credit for his expenses?

A. Certainly.

Q. If he bought a carload of tractors, you would give him credit for that?

A. Yes, I would.

Q. If he bought eight or ten thousand dollars worth of automobile tires, would you give him credit for that?

A. Yes, sir.

Q. You would give a married man credit for about $2,200.00 or $2,500.00?

A. $2,000.00 for personal exemption, and for each dependent $200.00.

Q. Do you remember the amount of time that Mr. Huffington gave me to get together all of the business that I had done in 1919, 1920, and 1921, three years?

A. I think, Mr. Sullivan, he gave you ten days the first time and five days the next time, as well as I can remember.

Q. I came back at the end of ten days. You gentlemen summoned me to a room and I came back at the end of ten days. I said, "Gentlemen, I havn't managed to get this stuff together. I am doing everything I possibly can. It is scattered all over the country"——

COURT. Ask him the question.

Mr. SULLIVAN. I told you that I had bought Fordson tractors from Henry Ford & Co., in Detroit; that I bought plows and harrows of the McLean people; that I bought plows, etc., from the Oliver people; plows from Sullivan (?) and tires—that I bought a carload of automobile' from the Moon Automobile Co. I bought a carload of tires from the Henderson people—and I told you—didn't I tell you that it would take me quite some time to get those things together?

A. I can't recall the different firms from which you were buying, but I do recall that you said your supplies, or the goods you were selling, were from all over the country. If I am not mistaken, you said from Canada to the Gulf.

38 Q. That covers a lot of territory. It takes a long time to get that stuff together. You will admit that I was given ten days, and then extended five days, to get this stuff together. I came back at the end of the fifteen days, per agreement, and I told Mr. Huffington that it was impossible for me to get it together—that I would have to have another extension of time, and he said, "Oh, you are kidding me; I am going to send this in." Do you remember that?

A. No, sir. I don't recall that.

Q. But you don't deny it, do you?

A. No, sir; I do not.

Q. You will admit that all of this stuff I bought in those three years, you would have certainly given me credit for, if you had been making that thing up?

A. Yes, sir.

Q. You will admit that fifteen days is a mighty short time to get that stuff together. I ask you the question: Isn't it a short time to get it together?

A. Well, it might be a short time. It depends upon how you would have to go about it to get it together.

Q. Did you or not know that I was a bootlegger at that time?

A. I didn't know it. I don't know it now.

Q. Glad to hear you say so. As far as you were concerned in your investigation, you didn't proceed along the line, then, that I was a bootlegger?

A. I didn't take any records, Mr. Sullivan. I did not take any records at all in your case.

Q. What was your official capacity at that time?

A. Internal revenue inspector—examination for income tax, checking incomes.

Q. Where is your headquarters?

A. Columbia, S. C.

Q. You were called down, or just happened to be in town at these conferences that I had with Mr. Huffington?

A. I was assigned to work with Mr. Huffington.

Q. I want to ask you a very important question, and that is: When Mr. Huffington took the figures off of the bank books, the Citizens Bank, the Enterprise Bank, and the Dime Bank, were you a party to that? Did you help him take them?

A. I didn't help to assemble any of this information.

Q. You will admit he got all of that himself?

A. I don't know anything about it. I say I had nothing to do with it.

Q. You were not present when he got those figures off of the books?

A. No, sir.

Q. And you are not going to verify whether or not these figures are right?

A. I don't know a thing about the figures. I didn't have a thing to do with them.

Q. But if you had been handling the case, you certainly would have given me time, and a chance to get this stuff together, and to make a proper income tax report, and give me credit for all the money that I spent?

A. You are entitled, as all taxpayers, to have credit for the cost of all goods purchased—the purchase price.

Redirect examination by Mr. MEYER:

At the time I was assigned to the case I found Mr. Huffington and Mr. Clowe already engaged in getting up the information.

J. A. RUSSELL.

Direct examination by Mr. MEYER:

I know the defendant, M. S. Sullivan, and I have known him since 1919. I knew Mr. Ike Goldberg of Savannah before he died. I also know Mr. Marshall Mackenzie of Savannah. I had occasion to work for Mr. Ike Goldberg and Mr. Marshall Mackenzie in 1919, and in the course of my work with these gentlemen we had transactions with the defendant, M. S. Sullivan. On one occasion I went to a vessel named the "Florence," and got a load of liquor from Cane Brake in the Sound, brought it in and turned it over to the owners and the owners paid Mr. Sullivan for it. During the year 1919 I saw money passed to Mr. Sullivan, and that money was for that whiskey. I saw $9,000.00 and $1,000.00 in cash paid to Mr. Sullivan, and it was during the latter part of 1919. This was the same Ike Goldberg who was convicted in Savannah for this liquor business.

Cross-examination by Mr. SULLIVAN:

Mr. Russell, where did you meet me?

A. I met your boat. I didn't meet you until I saw you in the house at Goldberg's.

Q. At Goldberg's house?

A. Yes, sir.

Q. You saw me in Goldberg's house?

A. I did see you.

Q. You saw somebody pay me money?

A. $9,000.00 and $1,000.00; yes, sir.

Q. Me, Manly S. Sullivan?

A. Mr. Sullivan; yes, sir.

Q. No; not Mr. Sullivan. I am Manly S. Sullivan.

A. Manly S. Sullivan.

Q. Did you see somebody pay me money?

A. Yes, sir; yes, sir.

Q. Where did you get this liquor?

A. Cane Brake, in the Sound.

Q. How did you get down there?

A. Got down there in a little boat.

Q. And got a load of liquor off of that boat?

A. Yes, sir.

Q. And who paid you for this?

A. It was two men, Marshal Mackenzie and Goldberg. They put up their money together.

Q. And you sit there and make a statement that you saw a man named Marshal Mackenzie and a man named Ike Goldberg pay me for the liquor that you had taken from this boat?

A. I did.

Q. And you kissed the Bible before you took this seat?

A. I kissed it.

Q. What boat was this that you got the liquor off of?

A. The name was "The Traveler."

Q. I don't mean that. I mean the boat you claim you got this liquor from?

A. The Florence.

Q. Was she an American ship or a British ship?

A. I couldn't vouch for that. I was told that she was under British registry.

Q. That she was a British ship?

A. Yes, sir.

Q. In what capacity was I on that boat?

A. You were not on the boat I got the liquor from.

Q. You didn't see me?

A. I did not.

Q. How did you know they got the liquor from me?

A. I was talking about you coming to the house and collecting the money. I was to go to Sullivan's vessel and get the liquor
41 and it was to be paid for. They said "Sullivan's vessel." That is all I know. They told me that. How do I know whose vessel it was?

Q. I don't think you ought to come up here and kiss the Bible and go on the stand and say it was Sullivan's vessel if it really wasn't.

A. I tell the truth as near as I can. It was represented to me as Sullivan's vessel.

Q. Who was the captain of the vessel you got this liquor off of?

A. I don't know.

Q. Did you go down to the ship and some deck hand just grabbed this liquor and handed it to you?

A. I had an order for the liquor. I went to the vessel's side and gave the order to the supercargo. I never asked any questions. It was handed to me. I took it back.

Q. If it had been my liquor or my boat, you would have come to me for it?

A. I didn't go to anybody for it. The man that hired me gave me an order for it, and I went and got the liquor.

Q. But you sit there and tell that jury that you saw me come to Goldberg's house, and this man, Mackenzie, whoever he was, you saw him give me money?

A. I did.

Q. I am through with it.

COURT. Was the order in writing?

A. It was.

Q. Was it sealed up?

A. Yes, sir. It was sealed in an envelope.

Q. You didn't see whose name was signed to it?

A. No, sir; I did not.

Q. Your instructions were simply to present this order to the boat "Florence"?

A. Yes, sir.

Redirect examination by Mr. MEYER:

Afterwards you went to the house?

A. Yes, sir. I was in there checking up to show that I turned in all my stuff.

Q. And while you were checking to show that you had turned in all your stuff, what did you see?

A. I saw this money paid to Mr. Sullivan.

Q. You saw the money pass to Mr. Sullivan, this defendant?

A. I did.

42 E. L. JOHNSON.

Direct examination by Mr. MEYERS:

I am not a citizen of the United States. I am a British subject, and in 1920 I was in the boat business, passenger, mail, and mail service, Miami and Nassau. I know the boat "Florence." At present Mr. R. J. Farrington, of Nassau, is the owner of that boat. I did not own that boat. I got it from Mr. Manly S. Sullivan, and I was what is known as owner of record of the boat. I don't think that I would be in a position to swear who was the owner. The boat was originally an American boat. A permit was granted from the proper authorities to transfer the boat to the British registry; therefore she would have to have a British owner. At the request of Mr. Sullivan I became the British owner. At the request of Mr. Manly S. Sullivan I became the British owner. I became the owner at the request of this defendant here. I became the owner of record. I did not pay a single nickel for the vessel. This vessel was probably worth fifteen, or twenty, or twenty-five thousand dollars. I would not have paid that much for her myself, because she would not have suited me in my business. I never received a penny in my life from the operations of that boat, nor anything from her since I knew her. I never paid a single penny of expenses for the operation of that vessel. I simply took the boat in my name because I knew Mr. Sullivan and did it as a friendly act to him. That is all. He asked me to put it in my name, just like hundreds of other cases

were done just about the same time. At the time that he requested me to put it in my name he requested me to give him a mortgage for the boat to protect him or the owner against the boat—whoever the owner was. I signed the paper to him, but I did not get a penny for signing that paper to him—absolutely nothing. The mortgage was drawn by an attorney in Nassau, and I read it and didn't like it, because it struck me that if anything happened to the boat, and I happened to be dead, why, probably he, or his wife if he was dead, could then come back at my wife, who would not have known
43 anything about this transaction, and they could probably put up a lien against my property. So I had a clause put in, that in case of the loss of the boat the mortgage would be null and void. That is usually done in all of those cases.

Cross-examination by Mr. SULLIVAN:

Mr. Johnson, you live in Nassau, don't you?

A. No. I live in Miami now.

Q. But you were born in Nassau?

A. That is right.

Q. Mr. Johnson, I want to ask you one question: Is it or is it not a mental or physical impossibility for an American citizen not only to own a British vessel in whole but to even own the controlling interest in a vessel in which a stock company owns the vessel?

A. He couldn't own it.

Q. It is impossible?

A. Yes, sir; absolutely.

Q. You stated that I asked you as a favor to me, as my friend, to take that vessel in your name?

A. Yes, sir.

Q. Did I or not tell you at that time who really owned that vessel?

A. No. I don't remember. As I said, I don't know really that you were the owner. The case is this: The ship could belong to the Clyde S. S. Co. You could go to the proper authorities in Washington and ask for a permit transferring this boat to the British registry—it would of course have to go to a British subject—that is this case exactly. So I don't remember whether the American title was in your name or not. You would have to go the ship's records to find out. I wouldn't swear to it.

Q. Now, if you owned a vessel, Mr. Johnson, and that vessel was going to be put up at auction and sold on the block, you would certainly be there to protect your interests, wouldn't you?

A. Absolutely.

Q. You certainly would. Sure. Mr. Johnson, how long has it been since you have been in Nassau?

A. I was in Nassau the 21st of December last.

Q. That was the last day you were in Nassau?

A. Yes, sir.

Q. Will you tell the jury, if you know, who owned the "Florence" when you were over there?

A. My last trip there? No, I really don't know the owner now. There has been some rumor there that the boat was sold
44 again—whether it was sold at marshal's sale or not—but I transferred the boat to another British subject in 1924. After I was docked on income tax, I thought I had better get my name off of it. I sold it for a dollar, and never collected the dollar.

Q. You say that this vessel was possibly worth fifteen or twenty thousand dollars, but you wouldn't give that for the vessel, because she wouldn't suit your purpose? But she is possibly worth that?

A. Yes, I suppose with her engines she was worth that.

Q. Do you or not know that vessel was sold on the block with foreclosure of a mortgage by some Cuban——

Mr. MEYER. I don't want my friend to testify.

Mr. SULLIVAN. I am asking him the question: Do you know that?

A. Yes, I did hear some rumor of that, three or four months ago in Nassau, that the boat was going to be sold at marshal's sale. But the moment I got my name off of her in 1924, I wasn't interested any more.

Q. Do you or not know how much that vessel brought at that sale?

A. No, I don't know. I don't think she would have brought very much, because she was lying in Nassau for a long time, and the last time I saw her, she didn't look in the very best shape. I wouldn't have given fifteen cents for her myself.

Q. Do you or not know the Cuban firm that foreclosed the mortgage on that boat?

A. Absolutely not.

Q. You don't know them?

A. Don't know them at all.

Q. But to the best of your knowledge, that vessel was sold recently?

A. I don't know that she was, but she was to be sold, I understood, at marshal's sale, for debts, anyway. There were two or three creditors over there, and I did hear something about a mortgage, but it didn't interest me. I paid no attention to it.

Q. And you don't know what that vessel brought on the block, when these Cubans foreclosed the mortgages?

A. I really don't. I shouldn't imagine it was much.

Q. Would you mind telling the jury who you transferred that ship to when you got it out of your name?

A. To Mr. R. J. Farrington, of Nassau.

Q. And he was a British subject and had the right to take over that vessel if he wanted to?

45 A. Absolutely. He went through the proper procedure to do it through the customs.

Q. And you know for a fact that it is a mental and physical impossibility for an American citizen to own a British vessel?

COURT. Do you mean as a matter of law?

Mr. SULLIVAN. Yes, sir.

WITNESS. In hundreds of cases ships are transferred from the American flag to the British flag, and an American cannot own under the British flag.

COURT. But I understand you to say that in hundreds of cases in which this transfer was made, it was taken in the name of a British subject, but the vessel was really owned by an American?

A. Oh, yes, sir.

COURT. Well, that is a physical accomplishment.

A. That is it exactly. The American would hold a mortgage against us. I don't know that the mortgage was really legal, but nevertheless, that is the procedure.

Mr. SULLIVAN. But that is the British law, to be the best of your knowledge?

A. Maritime law, to the best of my knowledge.

Q. England protects her interests with ship's bottoms very rigidly, because that is probably her only source of revenue.

A. G. WATSON.

Direct examination by Mr. MEYER:

My official position is assistant collector of customs for the District of Florida, and in the course of my duties I have had occasion to do business with the boat "Florence." According to her papers she was under British registry, but I don't know whose name she was in. I will look at my records to refresh my memory—it doesn't show—she was a British vessel. I had two conversations with the defendant, M. S. Sullivan, in regard to that vessel. The first conversation was in July, 1923, at which time I met him by appointment at the Elk's Club in Tampa, and he questioned me in
46 regard to the cancellation of a bond which had been given in connection with the arrival and departure of the "Florence," in October, 1922. That vessel had arrived there—that is to say, she had been off of the coast. She was picked up by an American cutter and brought into Fernandina with her shaft broken, I believe. She had a cargo of liquor on her, signed to St. Pierre Miquelen, which is off the coast of Canada; and at that time the Secretary of the Treasury issued an order requiring that a bond be taken on the clearance of the vessel for the production of landing certificates showing the line of the cargo, in St. Pierre. The conversation was in regard to the cancellation of the bond. Certain certificates were produced which were not acceptable, and Mr. Sullivan came down and told me at that time that his brother, Scuddy W. Sullivan, was the master of the boat; that he had put in, in distress, as I have described it to you, into Fernandina; and that Scuddy W. Sullivan had himself, being the master of the vessel, and responsible for the cargo, had put up $18,700.00, in either cash or collateral for a certain surety company to go on this bond. In justice to Mr. Sullivan, I will say also that at that time he told me that his

brother was not interested in the cargo nor in the vessel either, as the charterer of the vessel, or as the owner of the cargo; and that his brother was a licensed officer, and had become so worried over this transaction that he had gone over to Europe, I believe, working as a day laborer. He also explained to me that there might be a possibility that these certificates were forgeries. That was the first conversation. That his brother—I am going an awful lot on hearsay. I am merely telling what Mr. Sullivan said—that his brother Scuddy had told him that he had got off the coast of St. Pierre after leaving Fernandina and that after getting off the coast of St. Pierre, he found there was ice in the harbor. That the pilots came out to him and told him the vessel couldn't get in unless she was sheathed, and that the consignee suggested that the cargo be unloaded into small boats and transferred to shore, and therefore that was done, and the landing certificates were produced, and that the consignee knew that the cargo had been landed there, but he didn't believe it was * * * because he had now satisfied himself that the consignee had smuggled the merchandise into
47 St. Pierre—that the consignee had smuggled the whiskey into St. Pierre. That was the first conversation. I had a second conversation with the defendant on or about Dec. 22nd, 1925. Mr. Sullivan came into the office and in the presence of the collector and myself, referred again to this $18,700.00 bond. He said that he himself had put up this $18,700.00 at the request of his brother. That he, M. S. Sullivan, had put up this $18,700.00 at the request of his brother, and for his brother. That as a matter of fact the liquor had never been landed at St. Pierre, and that it was never intended, when they left Havana, for it to be landed at St. Pierre, but it was in fact landed off the coast of Georgia. But in making that statement, he made this further statement, that at the time the cargo was unloaded from the "Florence"—I can't tell you whether he said he was more than three or more than twelve miles off the coast, but he indicated that he was at least more than three miles from the coast, at the time of the unloading of the cargo. That his brother had no interest in the cargo; and I am quite sure also that Mr. Sullivan stated that he, M. S. Sullivan, had no interest in the cargo either; that it did, in fact, belong to one Willie Haar, I believe. I also asked Mr. Sullivan in regard to the ownership of the "Florence." A part of that conversation I remember very distinctly, but nothing so much about the case. There is a part that I wouldn't care to say whether he said or not. He did say this: I asked him if he was the owner of the vessel. No, I asked him whether he, M. S. Sullivan, was the owner of the vessel, and he said, "Why, you know that no one but a British subject could be the owner of a British vessel." Now, whether I then asked him another question and he told me the owner, I couldn't swear to, because I have got the case in that connection so firmly fixed in my mind that I don't care to do him an injustice of even assuming that he did tell me, unless I was positive about it.

Cross-examination by Mr. SULLIVAN:

Mr. Watson, isn't a fact that I told you that I didn't own that vessel?

A. Which conversation was that, Mr. Sullivan? Because you contradicted yourself from the first conversation to the second; which conversation have you reference to?

48 Q. I thought you asked me that about the 22nd day of November?

A. On the last time?

Q. The last time; yes, sir.

A. I couldn't say, Mr. Sullivan, because if I answer that question I would also have to say what I think you told me, and I couldn't swear to either one of the statements.

Q. All right. There is just one little thing I want to refresh your memory about. Isn't it a fact, Mr. Watson, that I told you that I had loaned my brother that money, not that I put it up myself, because the bond itself will show that my brother, S. W. Sullivan, put the money up; I didn't go anywhere near the office?

A. On which conversation? The first one or the last?

Q. The first conversation was such a long time ago that you don't expect me to go back, but on the 22nd of November, isn't it a fact that I told you that I had loaned that money to my brother? I am going to refresh your memory by saying——

A. Don't refresh my memory. Ask me the question.

Q. Didn't I tell you that I had loaned my brother that money?

A. Yes, sir; that is correct.

Q. That he was in trouble, and that a man wasn't worth a doggone that didn't stand by his own flesh and blood?

A. That is exactly what you said; you said this to me in the presence of the collector. You said that you had put up the money. At a later time, you were asked whether you didn't take some security. You said you hadn't, and you were asked why. You remember that conversation? And you stated that anyone who was worth anything at all would go and stand by his own kith and kin. But my impression is—at least my understanding was—that you had put the money up. That was my understanding of the second conversation.

Q. I had loaned my brother the money?

A. To put up; yes, sir.

Q. But you made the statement to the district attorney that I put the money up?

A. I think those are the very words that you used in the first part of your conversation.

Q. I am sorry to have to contradict that. But, however, I can't do that now. You know that my brother was in that boat in distress?

A. That is correct. The vessel was in distress.

49 Q. Brought her in from sea, and he was required to put that bond up?

A. I can't testify to that, only to the fact that the vessel was somewhere off Cape * * *, but at that time a man went ashore and called up the Coast Guard cutter. At a later time, the "Tallapoosa" came along and found that vessel about 5¾ miles off St. Augustine.

Q. In a legal position?

A. I won't say whether it was a legal position or not. That is a question of law.

Q. You know that the vessel wasn't seized?

A. Oh, no; she wasn't seized.

Q. Then she was in a legal position?

A. I don't know. I can't testify as to that. She was 5¾ miles off of St. Augustine at the time she was picking up. The master—captain * * * of the "Tallapoosa" told the master, according the official reports, that the vessel wouldn't be if she was brought in, in distress; that she was taken in, in distress and taken into Fernandina and there turned over to the deputy collector in charge and that a bond was executed before she cleared in the sum of $18,700.00; later, certain certificates were produced and those certificates were turned down by the Government on the ground that they were forgeries, and that the balance of the proposition came in your conversation with me in July and your conversation with me again in December.

Q. What I want clear is the fact that whether or not you made the statement that I put up that bond when the bond itself will show that my brother S. W. Sullivan actually put that money up?

A. The bond will not show that Scuddy W. Sullivan put the money up. There is no mention made in the bond at all of any money. The bond is put up with Scuddy W. Sullivan as principal, and the Royal Surety Co., I believe as surety. But there is no mention in there of any collateral which may have been put up with the bonding company, and so far as I know, the Government has no money or other collateral, other than the bond; so that we don't know, except from that conversation with you, as to who might have put up the money or who did not, or whether any money was put up.

Q. I just want it clarified whether I put the money up or my brother put it up?

A. I couldn't say.

Q. My brother was master of the vessel, and he put up the bond?

A. You, of course, know. I don't.

50 COURT. I understand there was no money put up for the Government at all?

A. Yes, sir. It was a regular bond.

Q. And Mr. Sullivan stated to you that the money was put up with the Surety Company to insure them?

A. Yes, sir.

JOHN G. CROSLAND.

Direct examination by Mr. MEYER:

My business at present is the wholesale fish and ice business, at Miami, Florida. I knew Mr. J. C. Weatherly. He was a nephew of mine, he is dead now. Mr. Weatherly was engaged in the wholesale liquor business in 1920. He was a wholesale liquor dealer in the Bahama Islands at a place called West End, and I was his partner. I did most of the purchasing in Nassau—had the goods transported from Nassau to the Island of West End in the Bahama Islands, and the warehouse was handled by Mr. Weatherly. We had a dispatch boat running between Miami, Nassau, and West End carrying supplies and money to be brought from Miami to me—money, checks, drafts, or any exchange of any kind. I knew the defendant M. S. Sullivan in 1920. I first met Mr. Sullivan at Miami, and I had a business discussion with him about buying liquor at West End. I couldn't say that Mr. Sullivan owned or operated a boat at that time. I can't say positively what boat was usually used in connection with his business. The only boat I have known Mr. Sullivan on, or with was a boat called the "Florence." While I was handling the checks in this liquor business, together with my nephew, Mr. Weatherly, I had occasion to see and handle checks of the defendant, M. S. Sullivan. Mr. Sullivan did some business with us, not very extensively. I handled at least two or more checks of the defendant M. S. Sullivan, as well as I remember about two thousand dollars or more in each check.

Objection, Mr. Sullivan, unless these checks are produced.

51 COURT. The checks go back to the man who draws the checks and the Government can't require you to produce them. I will admit the evidence for what it is worth. It is a collateral matter, anyway.

WITNESS (continues). When Mr. Sullivan would purchase liquor from us he would pay by check and sometimes part cash. Some of these checks were drawn on Charleston, and I think one on Columbia, but I won't be positive about the Columbia check, because I had some trouble with a Columbia check not being good, and whether it was Mr. Sullivan's check or not, I can't say—I was under the impression—but I am not positive about that. In the Bahamas in 1920 a good grade of rye whiskey was bringing about $35.00 a case; Scotch, about $28.00 to $30.00; gin, $12.00 or $15.00, according to the grade. I am not familiar with the prices they used to get in the States for it. I am not familiar with the custom of freightage of liquor from the Bahama Islands to the States—only what I have heard. I do know, of my own knowledge, what was paid *paid* for transporting liquor, in one or two instances. In 1920 and 1921, I owned a vessel that I chartered out, and she got $10.00 a case freight. I do not know how many cases the "Florence" could carry.

Cross-examination by Mr. SULLIVAN:

Mr. Grosland, did you ever sell me any liquor at West End or any other place?

A. Only through my associate, Mr. Weatherly.

Q. I asked you that question. I asked you if you *if you* ever sold me any liquor at West End or any other place?

A. Only in the way I have stated.

Q. You didn't sell me any liquor?

A. Mr. Weatherly did.

Q. You don't speak for Mr. Weatherly. I am asking you about John G. Grosland?

A. Directly, myself, personally, I never did.

Q. You never did sell me a drop of whiskey other there?

A. The house that I was connected with did.

Q. How do you know that they did?

A. Because I got your check for it—I was over there, checked up the books, and knew the amount, and so forth.

Q. You only knew that I purchase whiskey from that firm
52 through a check handled by one of your employees, but you yourself never sold me any whiskey or accepted any money or checks from me?

A. I never directly sold anybody any, but the house that I was interested in did.

Q. I am asking you about you.

A. I answered your question. I said, directly I never sold you nor anybody else any.

Q. When you went over to West End and you found one of my checks there, or that check was sent over to the United States you assumed that I bought whiskey with it, because you had nothing else to sell?

A. That is about the thing it would be for, for liquor. We didn't sell anything else.

Q. I want you to refresh your memory a little bit about the amount of those checks.

A. What about it?

Q. That is about what I want to know. I know what they were, and I just want you to tell the jury.

A. I think my answer was that I didn't know exactly the amount.

Q. You don't know the exact amount?

A. Not the exact amount. That has been a good many years ago and I don't carry those things in my mind.

Q. I called on you on another matter, don't you remember, about two months ago?

A. Somewhere about there.

Q. You and I have been friends for years—ain't that right? And I called on you about another matter, and I asked you, how comes it that you showed up at Savannah to appear against me in my case, and didn't you answer me by telling me that the Government had two of my checks?

A. I don't know whether I said that, but I know that the Government came and examined my books, and found where your checks went through my books.

Q. They didn't have the checks then?

A. That I don't know. I couldn't answer that question—I couldn't answer for the Government.

Q. You told me at that time that they had the checks and that is why they had summoned you at Savannah?

A. I don't think I told you the Government had the checks; but the Government went through my books and found the checks; I kept all my books in Miami.

Q. See if you can't remember that one of these checks was for $730.00.

53 A. I don't recall. I got so many from over there, different people, that I don't recall. One of your checks, if you insist, was for an amount much over that. I would say more than two thousand dollars, because it came here into the bank, and was protested. I got my bank to wire this bank here to hold it for collection, and finally it was paid. I had a long-distance telephone conversation with you. That was the one that impressed me more than the balance, from the fact that it was protested.

Q. You say it was something over one thousand dollars?

A. Yes; if my memory serves me right, it was something over two thousand dollars. If it had been for a few hundred dollars, I wouldn't have minded so much.

Q. Whatever the check was, I did pay?

A. Yes; after several days. Yes, sir.

Q. Isn't it a fact that the largest check you ever got from me was for $730.00, and the other one was for $320.00?

A. I don't remember that.

Q. You won't deny it?

A. Just what I say is what I believe.

Q. You will admit that with the price of liquor in West End at that time, what it was, you could almost carry $730.00 worth of whiskey in your pocket, it wouldn't amount to much?

A. It would have to have been a big pocket.

Q. It wasn't anything a man could make any profit on, a mighty small transaction—and that $332.00 I think is the correct amount——

A. I don't know what it sold for in this country at that time.

Q. It was a small amount? Even if your statement that that check was for $2,000.00, was correct, I couldn't have made much money on that?

A. That I don't know, Mr. Sullivan.

Q. I have been tried on this prohibition business, and only got to worry now about this income tax; but those two things are very vividly impressed on my memory, because when you told me—

COURT. Ask him the question.

Mr. SULLIVAN. You can't recall, Mr. Grosland, the amount of the checks, can you?

A. Exactly, I can't and I so stated that at first.

54 Q. You won't deny that that large check was $730.00 and the small one, $330.00?

A. My impression is just as I first said; it was something over two thousand dollars.

JULIUS E. COGSWELL.

This witness testified:

I am registrar of Mesne conveyance of Charleston County. The records of all deeds and mortgages are kept in my office. The records of my office show the following transactions in reference to #248 Congress Street, Hampton Park Terrace, Charleston, South Carolina. book H-29, at page 150, shows that this property was deeded by Wilson G. Harvey to M. S. Sullivan, by deed dated 23rd October, 1919, and set out the consideration to be $10.00, and other valuable consideration, and the deed has affixed thereto $7.00, in documentary stamps. According to book L-29, page 111, M. S. Sullivan gave a mortgage over this property to Wilson G. Harvey on 23rd of October, 1919, in the amount of $3,000.00. According to book Z-30, page 113, M. S. Sullivan deeded this property to his wife, Crystal Svendsen Sullivan, by deed dated July 25th, 1922. The consideration as set forth is $10.00, and other valuable considerations, and the deed sets forth that this conveyance is made subject, however, to the existing mortgage to Wilson G. Harvey and to an existing mortgage to Belle Blank in the amount of $5,000. The record also shows in book U-30, at page 96, that the master in equity, Frank K. Myers, conveyed this property to Crystal S. Sullivan on the 20th of March, 1924, for a consideration of $8,100.00, she having been the purchaser at a masters's sale of this property. The record also shows that Crystal S. Sullivan, on the 20th of March, 1923, gave a mortgage over this property to J. F. Ohlandt, for the sum of $3,000.

B. Z-29, page 229, shows a conveyance of #129 Market Street, Charleston, S. C., from J. H. Kohnke to M. S. Sullivan, the deed bearing date July 1st, 1920 and the consideration being mentioned as $10.00 and other valuable considerations, and the deed bearing $10.00, in the United States documentary stamps.

55 Book R-30, at page 10, shows that M. S. Sullivan gave a mortgage over this J. H. Kohnke on July 1st, 1920, for $6,500.

Book X-30, page 71, shows a deed for the premises known as #125-127 Market Street, Charleston, South Carolina, conveyed by the Thetis Realty Company to M. S. Sullivan in April, 1921. The consideration being set forth as fifteen thousand dollars.

Book G-30, page 217, shows that M. S. Sullivan gave a mortgage on this property to the South Carolina Loan and Trust Company on April 18th, 1921, for $10,000.00.

J. J. CONLON.

Direct examination by Mr. MEYER:

I am employed in the customs house building. I handle all of the navigation papers of boats as a part of my duties. I am an officer of the Government. I am a deputy collector of customs. This record is an original record of my office. It is kept during the regular course of business of my office. These books are kept in routine as soon as they are used up. In other words, these books are made simultaneously with the facts. That is a book showing the ownership of licensed or enrolled vessels. This book shows that M. S. Sullivan owned the "Swannanoa" since 1918. The date of the making of that record in my office was December 5th, 1918. The records of my office show a change of ownership from M. S. Sullivan since 1918 in the "Swannanoa." The records now show that the boat is owned by Albert M. Sullivan. The records showing as to how he got the ownership of that vessel are not here in the office, but I recall that the United States marshal auctioned the "Swannanoa," and Albert M. Sullivan came into the office and signed as owner. That was last year some time. I don't recall the date. I don't know of any change of ownership between those two dates.

Cross-examination by Mr. SULLIVAN:

Mr. Conlon, do you or do you not know that on the 16th day of August, 1922, that the vessel in question, the "Swannanoa,"
56 was seized by the U. S. Government and held by them, up to and after the time that I was tried, and then sold at public auction?

A. I don't know whether the boat was seized or not.

Q. But you would surmise from that, the U. S. marshal gave title to it, and you recognized that in your office, and transferred the title to my son, in that boat; you would naturally suppose that that boat was sold at public auction, and bought in by my son?

A. I testified to that fact before; that the U. S. marshal did auction the boat, and that it was bought by Albert M. Sullivan; but as to the seizure of the boat at some previous date, I do not know.

Q. You do not know whether the boat was seized or not, but you do know from the circumstance of getting the title from the U. S. marshal, that it must have been sold at public auction, and bought by my son?

A. Yes, sir, it was sold at public auction according to the bill of sale in our office.

Q. You do not remember the figures? That would not show in the bill of sale?

A. Yes, sir. As near as I recall, the boat was bought by Albert M. Sullivan for $165.00, but I would not take oath as to that particular figure. I think that was the figure.

Q. Around $165.00. That is all the boat bought at public auction, sold on the block, bought in by my son. My son is an American citizen and has got a right to buy that boat——

COURT. Don't testify. Just ask the question.

CHARLES H. NESLE.

Direct examination by Mr. MEYER:

I am in the real estate and shipping business. I am from Miami, Fla. I know the defendant, Mr. Sullivan. I have known him since around about 1920. I only know what Mr. Sullivan was doing in 1920 by reports. I saw him in 1920, but not to have a conversation with him. The first time I saw him was in Nassau, in British Bahamas. I was walking from the docks up to the hotel with Mr. Haar, the old gentleman who was over there in some land
57 deal, when Mr. Sullivan came along, and the conversation started as to what they were doing there. "Well," he says, "I am over here getting a load, putting on about eighteen, and I will try and get it out tomorrow afternoon." From this conversation Mr. Sullivan meant that he was putting aboard eighteen hundred cases of liquor at the docks. I went down to the dock to find out what he was doing and he was putting them aboard the vessel "Florence." I saw the "Florence" a little later; in the fall of 1921 I saw her in Cane Brake Creek, south of Savannah. I did not see Mr. Sullivan at the "Florence," but I saw him the following afternoon in the town with some of the parties that came away with some of the boats that were down there. The boats that came out of the creek were apparently loaded with something. I could not see what it was. The boats were going towards the town. I called up Mr. Hanson, who was then general prohibition agent in charge of that district, and, as a result of what I told Mr. Hanson, I went down there to find out whether it was so or not. I saw boats going in there, and coming out of the creek. I saw the "Seabird." Samuel Goldberg was the owner of her. He was in the liquor business. I saw a boat called the "Richard Eddie." I do not know whose boat that is. That is all by hearsay. I did not know any of the parties that were on it. John Bailey usually operates that boat. I cannot say whether he was a bootlegger or wholesale liquor dealer; he was presumed to be one. I saw another boat operated by a man named Joe Cercopley. The boat was about fifty feet long. I understand that he was in the liquor hauling business, too. As a result of what I saw I followed the first boat that came out. The boat went across the bluff, and after a few days preliminary investigation, a large seizure of liquor was made there. That boat was the "Seabird." That boat was coming from the "Florence." The prices of liquors in the Bahama Islands during the years 1919, 1920, and 1921 was anywhere from $10.00 to $12.00 a case, according to quality. I only know by hearsay what boats were getting for transporting liquors from the Bahama Islands to the States. I never transported

a bottle of liquor into the United States since the Volstead Act went into effect; neither have I sold any. In 1920, when I was in Savannah, it was bringing between $75.00 and $100.00, I was employed in 1921.

58 COURT. Was that wholesale or retail?

A. That was buying it by the case, your honor, the presumption is that it would be less where large quantities were bought.

WITNESS (continues). The same day that I saw the "Seabird" going up across the bluff, I came into town and made a report to Mr. Hanson, and by agreement I went and followed around and watched the activities of Mr. M. S. Sullivan. Mr. M. S. Sullivan was stopping at the De Soto Hotel, and I saw him in company at three different times with Mr. Sam Goldberg. Sam Goldberg is the same man that carted off the liquor from the "Florence." I have seen the "Florence" in the harbor of Havana but that was later on. She was loading liquor then. Mr. M. S. Sullivan was not present at that time. It was not this Sullivan; another man, taller than he is, the other Sullivan, was present at that time.

Cross-examination by Mr. SULLIVAN:

Mr. Nesle, are you the same man, commonly known amongst the bootleggers that was such a terrible—known as Old Man Pop Nesle? Is that your nickname down in that country?

A. I think so.

Q. You were employed by the Federal Government at that time?

A. I was in 1920.

Q. That is the time that I speak of now.

A. And creek? A. Absolutely right.

Q. And until 1921?

A. No, there was a time between the two dates that I was not employed.

Q. What I want to find out, was or was you not a Federal officer at the time that you saw these boats come out of this creek?

A. I don't think I was. I know I was not.

Q. You just told the district attorney and the jury that you got a report and that you went and got Mr. Hanson, and you took a boat and you made a trip of 20 miles?

A. Entirely right.

Q. To go down and see these boats come out of the creek?

A. Absolutely right.

Q. But you wasn't an officer of the Government then?

59 A. I was not an officer, but I was hired and my boat was hired, $20.00 for the day, to do scout duty for the department.

Q. I see. Now, Mr. Nesle, did no not you have aboard that boat when you saw these boats come out of the creek, this Federal officer Hanson?

A. No, sir. He would not go down there.

Q. Although this report had been made to him by you?

A. It was.

Q. Although boats were being loaded and brought out of there he would not go down?

A. It was. He didn't.

Q. But you took it on yourself to go down and see whether or not these boats came out?

A. I was sent there.

Q. To see if the information was correct?

A. Yes, sir.

Q. But the Government official in charge of that boat at that time didn't think enough of it to go down himself, so he sent you to investigate; is that it?

A. That is the idea.

Q. Now, you told the district attorney and the jury that you saw the "Florence" in Cane Brake?

A. In Cane Brake Creek, I saw her. Yes, sir.

Q. Would you, or would you not, have to go up and around and into this creek out of the regular channel of commerce, to get to this boat?

A. Well, there was one you can see in there, that you don't have to follow the regular course, the way the "Florence" was.

Q. And which way did you use?

A. I was back around in there—There is a house in there. You can't see it from the "Florence," but you can see back of the island at one point, where exactly this has taken place.

Q. How many miles is it from the place where you claim you could see this boat to where you claim the boat was?

A. It was not very far; a whole lot less than a mile.

Q. And you could recognize this British boat the "Florence" from where you were to where you claim she was, in this creek?

A. I can recognize the "Florence" 10 miles off, if I can see her that far.

Q. But there was a marsh, and islands, between you and this place?

A. Yes, sir.

Q. You are talking to a man who knows every foot of that country. There was islands, and there was marsh between where you claim that you were, and where that boat lay. Isn't that right? There was islands and marsh, but still you could recognize the boat?

60

A. I could see her, and I could recognize it.

Q. What was the stage of the tide at the time you saw that boat?

A. I could not tell you that. I paid no attention to it.

Q. You would not make a statement whether it was high or low tide?

A. I think it was high tide that morning.

Q. But you don't know? You could not swear?

A. At low tide you could not see it at all.

Q. That is the point I wanted to bring out—no boat or anything—but you claim you could see the "Florence"?

A. I did.

Q. You also made a statement that you did not see M. S. Sullivan?
A. Not on the boat. I saw you the same day in town at the De Soto Hotel, with Sam Goldberg.
Q. Me?
A. Yes, sir, you.
Q. You saw me at the De Soto Hotel, with Sam Goldberg?
A. Yes, sir. You.
Q. You made that statement that you saw those boats come out of that creek?
A. I did.
Q. And they were apparently loaded?
A. They were.
Q. You could not tell whether they were loaded or not?
A. I know they were loaded, but what they were loaded with, I couldn't tell.
Q. How do you know they were loaded?
A. I have followed the boat business practically two-thirds of my life time, and I am sixty-six years old now, and I know when a boat is light or when it is loaded.
Q. But you couldn't swear what was in those boats?
A. Oh, no, sir. I followed the "Seabird" to where she went, and afterwards a large quantity of liquor was seized there.
Q. Was it seized on the "Seabird" up on the beach?
A. It was seized in places where it was hid in caches in the ground.
Q. Not in the boat?
A. Not in the boat, no sir; but that trip is the outcome of what followed.
Q. But it is only supposition on your part, i-n't it?
A. Oh, I could not say that the liquor came off the "Florence." No, sir, I would not say anything like that, Mr. Sullivan.
61 Q. That is what I want to find out, that you could not swear whether or not that liquor came off of the "Florence"; or whether it came off of the boat that you saw coming off from the "Florence"?
A. We went up there and watched that territory, and afterwards liquor was seized there.
Q. How many days was it from the time that you saw the "Seabird" go up there, up to the time you caught that whiskey?
A. It wasn't but a short time.
Q. You ought to know about how long.
A. No, I can not say.
Q. It was not the same day?
A. No, no.
Q. Was it the same week?
A. It might have been ten or twelve days afterwards.
Q. You will admit there was plenty of time for a thousand boats to go in and unload liquor by that time?
A. No doubt about that.

Redirect examination by Mr. MEYER:

I can not remember the height of tide on any specific day back in 1920 or 1921. I know it was high tide, because if it was half tide, you could not see, nor at low tide, and if there was a fall of six or seven feet, you couldn't see: and I did see the "Florence" there. When they went down to Florida Pass they were 150 or 200 yards apart. There is nothing up there that these boats could have been coming from: that was the channel place where they unloaded the liquor. I did considerable work down in there for the Government. In fact, it was shortly afterwards when a boat was seized that came in there, the "Polly," seized by me and an agent.

Recross-examination by Mr. SULLIVAN:

Mr. Nesle, now isn't a fact that this creek upon which you claim that the "Florence" was lying, is the main route and practically the only big landing on that big island, that island just back over there, where that millionaire has that wonderful developments, and isn't it a fact that boats are coming and going continually, loaded with one thing and another for where the millionaire is building a sanitarium?

62 A. They may be now, but they wasn't them, no building activities were there then. I was there for months, almost every day.

Q. Did you ever land on that island?

A. On both ends.

Q. But not on the middle, where the development was going on?

A. No, sir: I landed further south.

Q. You don't deny that there is more than one way of going up to that island?

A. Yes, they can go in there.

Q. Will you deny that that is the main creek, is the main landing for boats going up to that island?

A. No, sir. The main landing is north of the island. There is a landing made for it, on the north end of the island.

Q. You don't deny that all this material goes up this creek that goes to this particular place, because it is nearer that landing where this development is going on?

A. You got three or four ways.

Q. I am talking about the shortest and most practical way to reach it from Savannah, or any other place, to get the building material nearest to that point?

A. There wasn't any building that I know of done in there, and of course I couldn't tell if they would take building material up there, but the nearest point is the north end of the island, where they always land.

Q. Then you do not know that this doctor that owns this island is building a big sanitarium?

A. He was not doing it then.

JOHN BAILEY.

By Mr. MEYER:

I am from Savannah, Ga. I know M. S. Sullivan. I have known him since about the first part of 1920. I know the boat "Florence," but I do not know who owns it. We always referred to it as the Sullivan boat, but it never was any distinction made.

COURT. Who referred to it that way? Mr. Sullivan?

A. No. He never told me it was his boat.

Q. You can't tell what others said.

A. I mean the general rumor.

Q. You can't tell that.

63 WITNESS (continues). I never saw him in connection with the "Florence"; not Mr. Manly Sullivan; not in connection, no, sir. Not that I remember. I had occasion to visit the "Florence" in 1920. In 1920 we went down there and took off 362 cases of whiskey. The boat I was on, this first 1920 trip, that was the "Swannanoa" that they took it off. This 1920 trip was the "Swannanoa." I got mine from the "Swannanoa." It was after dark. The "Swannanoa" was lying in what we call Cane Patch. I was operating a boat called the "Richard Eddie," the same boat referred to by the previous witness, Captain Nesle. That was not the same trip refererd to in which the liquor was shortly afterwards caught. The other trip, as I remember, was about seven months later the following year, just before Christmas in 1921. That is when we took the whiskey from the "Florence." If I remember correctly we got about 650 cases bottled in bond liquor at that time. The names were Louis Hunter and Cedar Brook. The way liquor is handled starting from the bases—from the Bahama Islands is: Some of the liquor boats have to go over to Bahama Islands, about four hundred odd miles from Savannah, Ga., and load up—it depends on what size boat—of whatever they can carry. Some carry various amounts. They brought as much as they could. These smaller boats that I mentioned a while ago would go and meet them around the whistling buoy or in various distances farther down, to assist them in. Then we go down and meet them in this Cane Brake Patch place that I mentioned. The boat was brought there, generally an English boat, once in a while an American boat, brought to Cane Patch, which is one of the main places. They would have at times other places—all that I ever—I worked for R. A. Bailey. I would have an order for so many cases, whatever boat it might be. I knew the crew and the captains, generally, on the boats, and didn't have any trouble getting the liquor I was supposed to get. That was taken, put on the small boat from the big boat, and the big boat then went away, right back to sea, because it was violating the United States laws by being inside the twelve-mile limit. Then it would go back to Nassau. That liquor was brought then in these small boats to various places, then out of these places, and landed, and then put in trucks

64 to different houses, or wherever it could be kept best; then distributed to a liquor place. The population knew about the whiskey business, and the automobiles would come and buy from those big dealers, any amount they wanted, small amounts or whatever it might be. That is the way it was carried on. The freightage for transporting a case of liquor by boat from the Bahamas to the States would depend on the size of the boat. A boat about the size of the "Florence," the general rule would be about $3.00, but yet I have known it to run anywhere from $2.00 to $5.00, but I never knew it to be more than $5.00; that is, to my knowledge; of course, it could have been. The "Swannanoa," if I remember correctly, never went across to my knowledge. She was a small boat. These boats that I am speaking about were twice the size of the "Swannanoa." Boats smaller than the "Swannanoa" have gone across, but they took a desperate chance. That size boat couldn't bring much freight. It would not be safe to bring more than four hundred cases. That is, I wouldn't want to. It would have to be $5.00 or better, because you couldn't make much money out of it. I guess the Florence would hold about 1,800 or 2,000 cases. That would be a plenty, I suppose. The sale of liquor down in the Bahama Islands in 1920 and 1921 would average different prices, such as gin and cheap whiskey, what you might call Canadian Club at that time. You could not sell Canadian Club in the States, because they had better liquor than Canadian Club, and you could not give it away; but gin was $14.00 to $16.00, maybe a little more. Louis Hunter was $28.00 to $30.00. In the States they would sell Louis Hunter about $50.00 to $60.00, right around there. That is, at that time. Of course, the price goes up and down. It various with the price. It was a question of supply and demand. If there was a lot of whiskey in, the price was low. If there wasn't, I have known it to be $100.00, but at this time, times were pretty good. I have known one man own all the liquor several times that we went after it in a boat to bring it in, but really the practice was the Big Four owned the loads. Willie Haar, Richard Bailey, Sam Goldberg, and old man Dick Barnes were considered the Big Four. The big men would own the whole load; it was a very rare thing for anybody else to bring it in except them. They most of the time had their own boats, 65 unless something happened to the boat, or it was laid up for some reason or other. Mr. R. A. Bailey had his own boat at times.

COURT. We are g/ing very far afield. We are not trying him for bootlegging.

WITNESS (continues). When we men would handle the whiskey from the boats we would not handle the money to the boats. The Big Four would handle that and take care of that end of it.

Cross-examination by Mr. SULLIVAN:

Mr. Bailey, you made a statement that you worked for who?

A. R. A. Bailey, worked for R. A. Bailey.

Q. Is he your father?

A. No; he is my brother.

Q. Mr. Bailey, you made a statement that you went to the "Florence" with an order and with that order secured a certain amount of whiskey?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. I ask you the question: Did you present that question to Mr. Manly S. Sullivan and get that whiskey?

A. No. The "Florence" trip I did not see you on the boat. In fact, I did not see you either time. There was a Sullivan there at night, but I couldn't tell if it was you. On this "Florence" trip, in fact, I did not see you at all. I was on the boat practically all day, and I did not see you.

Q. You didn't hand that order to me and get the whiskey from me?

A. No; I did not see you.

Q. Do you or not know whether there was a Sullivan there at the "Florence"?

A. Yes, sir. It was your brother.

Q. In what capacity was he in?

A. He was the skipper.

Q. You did not see me either there or down at the other boat, did you?

A. At the other time, now, it was dark, and there was a Sullivan there, but I don't remember whether it was you or not. It was after dark.

Q. You did not, either time, you did not give any order to me or get any whiskey from me, neither did you see me at the place?

A. The first time, we did not need an order. It wasn't for R. A. Bailey. It was for Willie Haar. He told me to go down there and get the whiskey that came. I didn't pay much attention.

66 CHRISTIAN SCHWARTZ.

Direct examination by Mr. MEYER:

I am from Savannah. In 1920 I was hauling liquor. I had occasion to get a load of liquor some time shortly before Christmas, at about the time that Mr. John Bailey testified. I got it out of Cane Brake Patch, out of a boat called the "Swannanoa." I think I got around about 360 cases. There were no other boats there at that time, except the boat we were on, and the "Swannanoa." Shortly after that we got some more liquor from another boat; we went a little further up in Cane Brake Patch after a boat there called the "Florence," and got somewhere between six and seven hundred cases. At that time there were several other boats there getting liquor, four other boats there getting liquor, five boats altogether. They were getting various amounts of liquor. One of those boats was putting liquor off. That was the "Florence." There were four other boats besides, taking it on.

Cross-examination by Mr. SULLIVAN:

Mr. Schwartz, at the time you were there at the "Florence," did you see me?

A. No, sir.

Q. You didn't see me?

A. No, sir.

Q. You didn't get anything from me?

A. No, sir.

Q. At the time you say you got the whiskey from the "Swannanoa," did you see me?

A. No, sir.

Q. You did not?

A. No, sir.

FRANK HUNTER.

Direct examination by Mr. MEYER:

I am from Savannah. I know the defendant M. S. Sullivan. I do not know the boat "Florence." I know the boat "Swannanoa" and I have been aboard the "Swannanoa" in 1919. I was work-
67 ing aboard her in 1919, and made a trip down South in her to a place across from Miami, over those islands. I don't know the name. I think they said it was the British Bahamas. We went over there and took on a load of liquor, about four hundred cases, and carried it off to Savannah. I did not see Mr. M. S. Sullivan nor have any conversation with him on that trip. I saw him when the little boat came up to unload off the big boat. He was on some boat, but I did not pay any attention to the name. It was a little boat, the same boat that unloaded the liquor. M. S. Sullivan, with some other fellow and one nigger, I think, was on the boat which got the liquor from the "Swannanoa." I think S. W. Sullivan was running the "Swannanoa" at the time it made this trip down there. He is the one they called Scuddy Sullivan, and is commonly known as Mr. M. S. Sullivan's brother.

(No cross-examination.)

Direct examination by Mr. MEYER:

I am the person generally referred to as "Willie Haar" in the previous testimony here. I was at one time in the liquor business in Savannah. I have served my time in the penitentiary for it. I know the defendant, M. S. Sullivan, and I first met Mr. Sullivan in 1919, I think. I didn't have any business transactions with him at that time. The only transaction I had with Mr. Sullivan was when I let him have some money to buy a boat for me up in New York, to haul some whiskey to New York, and freight, and afterwards I decided not to get the boat, and I let Mr. Sullivan have the boat, and he still owes me twenty thousand dollars. I have him twenty thousand dollars in 1921, or 1922. I don't remember. I did not get the boat and I did not get the money. I was at the head of my

business in Savannah, and I had people working for me. I know the boat "Florence" and I had some business with the boat "Florence" in the nature of hauling whiskey from Nassau to Savannah. I do not know what I would have to pay a case of hauling whiskey from Nassau to Savannah aboard the "Florence." It would be according to how much merchandise I would have on the
68 boat. Sometimes it would be as low as $2.50 a case. During the year 1920, the "Florence" made about three or four trips for me. I possibly paid in 1920 around $20,000.00, for hauling whiskey on her. During the year 1921, the "Florence" made possibly around the same number of trips. It might have been more or less. I don't know just off-hand. During that year, 1921, I paid in the neighborhood of $20,000.00 or $25,000.00 dollars. I don't remember the amount of liquor that was aboard the "Florence," when she came in at Fernandina, but I remember the boat going into Fernandina. A part of the whiskey on board I had taken off outside of Savannah, beyond the whistling buoy, outside of St. Catherine's Sound. I did not get the whole cargo. I don't think I did. I do not know how much was taken off. I put up a bond of $18,000.00, in fact, I did not put it up, I instructed my brother to put the bond up. I was in New York at the time the boat was taken into Fernandina. My brother called me and said that Sullivan got in touch with him. He did not say which Sullivan. I got the whiskey from that boat. I understood that the boat was the "Florence." The bond was for $18,000.00.

Cross-examination by Mr. SULLIVAN:

Mr. Haar, you are from Savannah, Ga., are you?

A. Yes, sir.

Q. Would you mind telling the jury how long you and I have been friends?

A. Since 1919.

Q. And good friends?

A. Yes, sir.

Q. Mr. Haar, you made a statement a few minutes ago that you loaned me $20,000.00—that is, you advanced me $20,000.00, for me to purchase a boat for you in New York, with which you were going to haul whiskey. Is that right?

A. Yes, sir.

Q. Mr. Haar, things went bad, and you never used that boat, did you?

A. No, sir.

Q. One boiler went bad, and she practically became a piece of junk. Is that right?

A. As far as I understood, yes, sir.

Q. You advanced me that $20,000.00?

A. Yes, sir.

Q. You must have had some confidence in me to do that?

A. I did.

Q. I just want to ask you a question: Do you or do you not consider that I am an honest man?

A. I do.

69 COURT. You can't prove it that way. If you wish to ask him as to your reputation you can do that, but don't ask him what he thinks. Ask him what your reputation is in the community in which you live.

Mr. SULLIVAN. Mr. Haar, tell the jury whether or not I still owe you that $20,000.

A. You do; yes, sir.

Q. Do you believe, from your dealings with me, that if I had any money at all I would come and pay you, don't you?

A. I do; yes, sir.

Q. You have heard on the stand Mr. Watson, from the Tampa Bureau of Customs, go on the stand and testify that my brother—he first testified that I put it up and then he testified that my brother put it up?

A. I was not in the court room at the time he testified.

Q. All right. Would you mind telling this jury about this transaction, about that money put up for that bond?

A. I said before, I was notified in New York that Sullivan's boat went into Fernandina, and he asked me would it be all right for him to put up $18,000.00 for that bond, and that I told him, "Yes, go ahead, and put it up," and he assured me I would get my money back when the boat left Fernandina—the merchandise was given to me in Savannah, outside of St. Catherine's Sound.

Q. And you got your money back in merchandise?

A. That is it exactly.

Q. And your brother gave my brother the money to put up for the boat?

A. $18,000.00—yes, sir. I understood it was your brother. He gave it to Sullivan. I am not positive whether it was you or your brother.

Q. I ask you the question: You were what was known as head of the Big Four Syndicate down there in Savannah?

A. Yes, sir.

Q. Would it be possible for me or any other bootlegger to go into Savannah and cut into your business and do business in Savannah without your knowledge?

A. I don't think so. No, sir.

Q. It wouldn't be possible with your line of connections?

A. We would know something about it in some way.

Q. Then I ask you the direct question: Did you ever hear of me or see me do any liquor business in Savannah?

70 Objection.

Mr. MEYER. Totally incompetent and irrelevant.

COURT. It is negative testimony, but you may ask him whether he knows himself whether you did any business in Savannah or not.

A. Not that I know of. I don't know whether he did business or not. He may have done business, but I can't say that he did. I would possibly hear something of it; I never heard anybody say you did.

Q. You had a lot of connections in Savannah, a lot of friends that would have let you know anything? No doubt you would have heard something about it if I had done business in Savannah?

A. I think I would; yes, sir.

Redirect examination by Mr. MEYER:

I knew it was a Sullivan connected with the "Florence," I did not know whether it was M. S. Sullivan or not. I knew it was a Sullivan. I would not say if it was him or his brother. I could not say that.

COURT. I would not open up general hearsay evidence. You can ask him hearsay of his dealings in Savannah since the defendant brought that out himself.

WITNESS (continues). As to M. S. Sullivan being in the liquor business, I have heard that he was in the liquor business in Charleston, and I only know that from general hearsay. I did not ever sell Mr. Sullivan any whiskey himself. I had people working for me who made practically all of the sales. As a matter of fact, the big men did not make the actual sales. They would put the other men to the front. The only thing I can tell you about the "Florence" is that it is generally referred to as Sullivan's boat, but Manly S. Sullivan never did tell me that he owned the boat.

Recross-examination by Mr. SULLIVAN:

71 You made a statement a while ago—in two years you had paid each year what you thought was approximately $20,000.00, in those two years for services of the yacht "Florence." I want to ask you if you paid me, M. S. Sullivan, one dollar of that money?

A. I did not, sir.

Re-redirect examination by Mr. MEYER:

The payments in the business as a rule were generally made by my brother, but I have made payments personally to S. W. Sullivan, the brother of M. S. Sullivan.

Government rests.

Defense

Mr. Sullivan asks for a directed verdict in favor of the defendant, but the court informs him that if he moves for direction of the verdict at this time, he waives his right to put up testimony or go on the stand himself. Motion withdrawn for the present.

M. S. SULLIVAN.

Gentlemen of the jury, the learned district attorney has very ably placed the Government's side of this story before you, and now it

come my time. Gentlemen, my name is Sullivan, Manly S. Sullivan. It is an Irish name, but as my mother and father both were Baptists I was brought up in the Baptist faith. I am neither a lawyer nor a college graduate. I had only a public school education and such education as a country boy can get, born in the foothills of the Blue Ridge Mountains near Walhalla, S. C.—walking four miles to school and four miles back in the heat. I have taken a long chance to defend myself in this case; because if you find me guilty, the judge has it in his power to give me five years and a fine of ten thousand dollars—

COURT. That would not be in both cases, but that is immaterial anyway. Come to the facts. The jury have nothing to do with the verdict.

72 Mr. SULLIVAN. Gentlemen, this case grows out of a prohibition case. In fact, all through this case you have heard nothing but prohibition—prohibition and income tax—two of the most damnable laws ever written on the books of the Government——

COURT (reprimands him). No attorney or no defendant can argue against the law in this court. We are all bound by the law. Get to the facts of the case. Tell the jury what you wish to say about this income-tax return and whether you made this money or not.

Mr. SULLIVAN. Gentlemen of the jury, on the 23rd of May, 1922, the Government seized from me a lighter loaded with whiskey and the boat, the "Swannanoa," that they brought out this morning. This whiskey was a total cost of about $43,000.00. The boat and the lighter both had a valuation. That was on the 23rd of May, 1922.

On the 14th of July, 1922, they seized a box car loaded with liquor, with 442 cases in it, at a cost of somewheres around $32,000.00. The Government naturally seized and took away from me all of this money in the form of whiskey.

Right on top of that, gentlemen, they brought charges against me and eight other men for conspiracy, a charge which carries with it two years and a thousand dollars. They dragged me before the courts at Aiken——

COURT. No use to go into that. What we want to know is the profits from this business, and when you made it. If you didn't make them, testify to it; but the question of your being prosecuted criminally and what became of that has nothing to do with the case. It does not make any difference, so far as this case is concerned, whether you were convicted or acquitted.

Mr. SULLIVAN. I am trying to make out that all these things cost money and took money away from me.

COURT. You can state what your expenses were during these periods, 1919, 1920, and 1921. Those are the three years in which your are charged with having made an income which you did not return. Now, testify to those three years.

73 Mr. SULLIVAN. Judge, your honor, this case wasn't made out against me until after this liquor case came out, and that is what brought it all on.

COURT. What the jury want to know, and what I want to know, is whether you made an income during those three years.

Mr. SULLIVAN. I was put to all that expense and had to pay these fines and all that cost money. I was put to the expense of going through the trial at Aiken, and all of which cost considerable money. Then that was a mistrial, so they tried me again in this very court, at Charleston—took two and a half days to try the case. I was put to all of that expense. I was acquitted in this court, and before I left the court room, new warrants were sworn out and I was rearrested in this court room and put under bond for transportation and possession. I was not guilty of conspiracy but I was guilty of transportation and possession, and me and my men went up before his honor, the judge, and plead guilty, and paid our fines. I had to pay the majority of these fines, also all of these expenses.

Now, gentlemen, the Government has produced the only books that I ever kept. I was in an illegitimate business. I have proven here—the Government has proven this, that I made an honest report of my legitimate business. The only records that I had of my illegitimate business was my bank account, and my deposits and the withdrawals during the year and the amounts left on hand at the end of the year. The Government has proved with their own witnesses, by the only books that I ever had, that at the end of the year 1919, I made a return for the tractor business, covering the expenditure of $12,000.00. I deducted $2,200.00 for having a wife and child, which I was entitled to, but yet my bank account, at the end of that year only showed that I had about $1,600.00. That was all that I made for that year, and I was entitled to $2,200.00.

Now, at the end of the year 1920, according to their own witnesses and according to their own testimony and their own books, while they showed that I deposited a lot of money, I was $36.00 and something overdrawn, and I was allowed $2,200.00.

At the end of the year 1921, according to their own witnesses and their own statements, taken from the bank book, I had in
74 hand $872.00, and I was allowed $2,200.00. In those years, gentlemen, it wasn't necessary for a man that did not earn over $2,200.00 to make a return.

Now, gentlemen, what was the method of procedure of the Government? The Government sent to Charleston a man named Huffington, and I was summoned, the latter part of 1922, to appear before Mr. Huffington, the Government's agent, in a room in the St. John Hotel, and Mr. Huffington said, "Mr. Sullivan, we want a statement from you for 1919, 1920 and 1921, and we are going to give you ten days to get it together." I said, "Mr. Huffington, I don't keep any books—I have done considerable business scattered all over the country, but in ten days I will do the best I can."

At the end of the ten days, I couldn't get this together and I asked for an extension of time and they gave me five days. In other words, they gave me fifteen days to get together all the information covering three years.

At the conclusion of the last conference, Mr. Huffington, who did all the talking—I never talked to another soul*d* on the case, although there were two other men present—Mr. Huffington says, "Mr. Sullivan, I am going to turn in this report." I said, "Well, sir, I am very sorry that you feel that way about it, but if you do, you will have to go ahead."

It was some time later—I don't know exactly how much later but some time later—when I received a notice from one of the departments—I don't know which department it was—stating that they wanted to collect $62,800.30!—$62,800, gentlemen!

Mr. Huffington told me that the method of procedure was to go to my bank and to take the figures of my deposits from that bank and build those figures up, strike a total and declare that my income, gentlemen! My income! The deposits in the bank! $62,800.30 is what they wanted to collect! I swear to God I never had that much money in my life altogether.

Now, gentlemen, a little time rolls on after I got this notice, and Mr. Huffington called on me again, but this time he don't summons me to the room in the St. John Hotel, but he calls on me privately, and he says, "Now, listen—"

75 Mr. MEYER. I don't know what my friend is going to talk about, but unless Mr. Huffington was representing the Government at that particular time, it wouldn't be competent.

COURT. I will have to see what Huffington said to him, whether he was representing the Government or not.

(To witness.) What did Mr. Huffington tell you he wanted to see you about?

Mr. SULLIVAN. Mr. Huffington directly made an offer to me that if I would pay him $2,000.00 that he would get this thing held up and get it squashed against me.

COURT. That would be incompetent. He would not be authorized to make that offer on the part of the Government.

Mr. SULLIVAN. I am going to prove a little later on——

COURT. Huffington has not gone on the stand; if he had, you might ask him—and his offer, if he made that to you, would be a dereliction of duty on his part, and would not bind the Government against you. That will be excluded.

Mr. SULLIVAN. Am I allowed to tell what happened after that?

COURT. If Huffington approached you officially about the matter—but I understood you to say that he called on you privately.

Mr. SULLIVAN. He did not summons me to the room in the presence of these other gentlemen, like he did before, but he met me on the street and told me this thing.

COURT. You can testify to anything which transpired between you and Huffington in reference to which the Government has placed in evidence on that point. The Government has placed in evidence here that Huffington and other agents met you and that Huffington had certain conversations with you. You are entitled to bring out

anything he said to you on those occasions; but what he said to you on subsequent occasions, they have not put in evidence, and you would not be entitled to bring that out. What a Government agent would say would not be binding on that issue.

76 Mr. SULLIVAN. A witness on the stand has sworn that Mr. Huffington was at the head of this investigation.

COURT. That is true; but he was investigating. He has not been put on the stand. The Government does not rely on anything that Huffington may have said or done. You can go into all the transactions and tell all that occurred with Huffington as to which the Government officials testified, but on other occasions that would not be admissible, because Huffington has no authority to bind the Government.

Mr. SULLIVAN. Well, gentlemen, I suppose I will have to proceed to say what took place after that. Then, after that, the gentleman from the local office called on me to collect this $62,800.00. I said, "Gentlemen, I don't owe the Government anything like that. I don't owe the Government a thing in the world." He says, "Well, then, strike a profit"—what they call a profit—"on your bank deposits." I said, "But, gentlemen, a man's bank deposits certainly does not declare his income, for the simple reason that a man may buy goods to-day. He will sell those goods. When he sells the goods he puts that money back into the bank. Then he will sell those goods over, and withdraw the money out to buy goods, and put it back in the bank again. There was another case during that time, that I loaned money, and when I withdrew it out of the bank and lent it to somebody—then when they paid it back I deposited it in the bank again.

At the time that this thing took place, gentlemen, the American dollar was one of the cheapest things we had. It had only a purchasing value of twenty cents. You will remember that.

Now, in conclusion, what happened? They said, "Well, we have no power over that, and we will collect this money." I said, "I can not pay it. I ain't got it. Never did have any money like that in my life. I don't owe. Those figures are all wrong. Certainly you went by the wrong method to get a man's income." They said, "Well, the law says that a man in an illegitimate business that has a net income—his gross income is all profits." But, gentlemen of the jury, that certainly looks to me it is unfair and unjust and uneven to declare a man's bank deposits his net income, because that forms an endless chain. Let any of your gentlemen take your

77 deposits for one year as doing any business, and see how that thing will multiply and pile up. But the question comes up—you have paid—at the end of that year, when the time comes for you to make a return to the Government, and the only books that I kept—all that I had outside of my legitimate business, which I have proven that I made a proper return—and in that bank account it shows a deficit at the end of each year, money on hand less than is allowed

to a man with a wife and child. I hold that I have neither perjured myself nor failed to make an income tax return—because in either case the law did not require it, if you did not make over $2,200.00, that you did not have to make returns.

Now, gentlemen of the jury, the Government has laid great stress on the ownership of the "Florence": and they have never proven that M. S. Sullivan ever owned the "Florence," but of my own free will and accord I am going to tell you about the "Florence." I am going to prove what I tell you by public records, as those records can be obtained.

The "Florence" in reality is owned by some Cubans, and I sold these Cubans a full Diesel engine in that boat, and with the sale of the engine in that boat, I was compelled, according to the contract for the sale of that engine to keep that engine in repair: in other words, a guarantee for a year. So as I had to guarantee this engine for a year, I naturally used by influence with these people that bought it to make my brother captain of the vessel, for two different reasons: One, because the job paid good, and I wanted to help my poor brother, and the other one was to protect my interests with that engine. My brother was on that vessel, received that money—why, that poor kid was a hireling and worked for a salary on that vessel. He did not derive a dime's benefit out of the profits that that vessel made on these trips. To prove what I am telling you—it is public record—Mr. Johnson got on the stand, and he told you, yes, that I had used my influence with him to get him to put that boat under British registry. I certainly did that. Why? Because the Cubans figured that the Cuban flag was not sufficient to cover the ground that they wanted to cover, because the alliance between the United States and Cuba was so great—that the flag would not have the same strength on the sea as the British flag: and I did use my
78 influence with Mr. Johnson to get him to take it under his name. Afterwards, Mr. Johnson transferred that vessel from his name to Mr. Farrington. That is a public record. You can go and get it off of the books. Then when he transferred it to Mr. Farrington, Mr. Farrington gave the true owners, which is a public record in Nassau, a mortgage on that boat: and just shortly—in the last three or four months, I understand—I have not been in Nassau—that vessel was sold at public auction, and these people foreclosed their mortgage in order to protect their interests: and that is public property and can be obtained in Nassau, and you can find out exactly who owned the vessel, and who got the money for it—and in reality I never did own the "Florence."

Now, gentlemen of the jury, have I got a right, your honor, to deny what a witness said on the stand?

COURT. Oh, yes. You can deny what a witness said.

Mr. SULLIVAN. Yesterday you heard a man named Russell put on the stand—a man who I understand has just been taken out of the pen and brought here. He got up on the stand and said——

Objection.

Mr. MEYER. He has got to prove these things. He can't make a statement about a man being out of the penitentiary.

Sustained.

Mr. SULLIVAN. My trouble was I did not find it out until after that man got on the stand and told the most deliberate lies that any man ever kissed a Bible and told! So help me God, I never saw that man before I got into this court, and I have never been in the house of Sam Goldberg in my life, and I don't know the man Mackenzie that he says paid me nine thousand dollars. That is a lie, gentlemen of the jury, so help me God, and how that man could get up there, deliberately and under what circumstances and conditions that man came up here and made a statement like that, I don't know! I brand that as a barefaced lie. I never seen this man Mackenzie that he claims paid me that money in my life, and never been in Goldberg's house, and never did any business with Goldberg.

79 Now, in conclusion, gentlemen, I want to say that they have me charged with perjury and failing to return. That is correct, isn't Mr. Meyer?

Mr. MEYER. I am sorry, sir; I am not on the witness stand.

Mr. SULLIVAN. All right. I think that is the charges they got against me—perjury and failing to return. My claim is that I am not guilty of either one. I am not guilty of perjury, because as I have been told the law, perjury is a man getting up and wilfully and knowingly telling a lie—perjures himself. I hold that I did not do that, because I had not made money enough—and the Government themselves proved that—to make a return. I mean that the Government has shown with their own figures, as I explained to you before, by the only books that I had—which is the truth, so help me God!—that I did not make enough money at the end of either one of these years to be compelled to make a return.

I hold on the other hand, that in the perjury end of it as I understand the law, a man has to wilfully tell a lie. I did not tell them any lie; because I did not make enough money to make any kind of return. So I could not perjure myself, and I claim that I am not guilty in either case *and I claim that I am not guilty in either case* and I claim this on the basis that the Government's witnesses themselves have produced the figures to show by the only books that I kept that I didn't make that money, and I did not get any of these profits from this firm.

That will conclude my testimony, Mr. Meyer.

Cross-examination by Mr. MEYER:

Mr. Sullivan, you are a citizen of the United States?

A. Yes, sir.

Q. And your legal residence during the years 1919, 1920, and 1921 was at Charleston, S. C.?

A. At Charleston, S. C., is my legal residence, yes, sir; I spend a good deal of time in other places at times.

Q. And your principal place of business was at Charleston, S. C.?

A. Yes, sir.

Q. And in what business were you engaged in 1919?

A. In 1919? I was in the tractor business.

80 Q. Were you engaged in any other business in 1919?

A. In any other business in 1919? I was not.

Q. You were not engaged in any business at all besides the tractor business in 1919?

A. And the sale of one engine to these people.

Q. And did you have the agency for that engine?

A. Yes, sir.

Q. How many of these engines did you sell?

A. Only one.

Q. And what did that engine cost you?

A. I have not got those figures at my finger-tips, Mr. Meyer.

Q. Give us some idea of what it cost you?

A. I think that engine cost somewheres around thirteen thousand dollars.

Q. And what did you sell that engine for?

A. Why, if my memory is correct, it was about a fifteen per cent proposition. I believe a twelve-and-one-half per cent proposition.

Q. Was it 12½ or 15½?

A. I won't make the statement because I am not positive.

Q. So your profit from the sale of that engine was 15% of about $13,000?

A. That is about right.

Q. And how many tractors did you sell during the year 1919?

A. All I can tell you is—I can't answer that.

Q. Give the jury some idea of about how many?

A. I could not do that at all.

Q. Did you sell as many as one?

A. Oh, yes, sir.

Q. Two?

A. Oh, yes, sir.

Q. Three?

A. Oh, yes, sir.

Q. Ten?

A. Yes, sir.

Q. Twenty?

A. I think I sold twenty.

Q. You think you may have sold as many as twenty?

A. Yes, sir.

Q. Do you think you sold any more than twenty?

A. Well, I do not believe I did.

Q. And what is the price of a tractor?

A. The cost of tractors at that time, I think, was—

Court rules that the defendant is here to meet only the charge that he made a profit out of the liquor business, and can't be expected to meet the charge that he made profits out of the tractor business. Under the indictment, it would be irrelevant to show that he made money out of anything except beverages, legal or illegal.

81 Q. Well, Mr. Sullivan, were you not in the whiskey business in 1919?

A. Yes, sir.

Q. And did you own the "Florence"?

A. I did not.

Q. Did you ever own the "Florence"?

A. I did.

Q. When did you own the "Florence"?

A. I say I owned it, but in reality, I never did own the "Florence": not in reality.

Q. You swear that you never did own the "Florence"?

A. I have explained that.

Q. Whether you did ever actually own that "Florence," or whether you did not own that "Florence"?

A. Well, it is a question of how that would be conveyed. If a man handed you money to go buy a boat for him and you took it in your name for temporary purposes—I did have the "Florence" in my name for a while.

Q. Did you have it in your name?

A. Yes, sir. During the time I was placing the engine in there for these people.

Q. How long did you have it in your name? What year?

A. It was immediately after the war. I bought this boat for these people immediately after the war.

Q. Who were the people you bought it for?

A. The man that I did business with was named Florenz or Lorenz—a Cuban. They have peculiar names. There was quite a block of them, but he was the man I did the business with.

Q. Where did he stay?

A. Havana, Cuba.

Q. What street?

A. I do not know that.

Q. You had it in your name at the time it was transferred to Mr. Johnson?

A. Yes, sir.

Q. You had Mr. Johnson put it in his name?

A. Yes, sir.

Q. You never paid Mr. Johnson one penny for putting it in his name?

A. No, sir.

Q. He never paid you one penny for that vessel, Johnson?

A. Paid me any money for the vessel? No, sir.

Q. You took a mortgage back from Johnson on that vessel in your name?

A. Yes, sir.

Q. When the matter came up about this boat, the "Florence," being captured down in Fernandina, you were the one that had the dealings about this vessel with Mr. Watson, the collector?

A. I deny that she was ever captured.

82 Q. You were the one that had the dealings about it when the boat was there, and the $18,000.00 bond was put up, the dealings with Mr. Watson, the collector, about the $18,000.00 bond in connection with this boat?

A. When?

Q. At any time.

A. Quite some time afterwards I did.

Q. What was your interest in it at that time?

A. Power of attorney for my brother to try to recover the bond, the man that put the bond up.

Q. Your brother never did own that vessel?

A. No, sir; he did not.

Q. Now, you were in the whiskey business in 1919?

A. Yes, sir.

Q. You bought whiskey?

A. Yes, sir.

Q. You sold whiskey?

A. Yes, sir.

Q. You sold it at a profit?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir. That is true.

Q. And give the jury some idea of how much you would make on a case of liquor.

A. That is a little unfair question, judge.

COURT. No; he has a right to ask you. You can explain whether or not on the final wind-up, what happened.

A. I don't know—buying whiskey down there at Nassau around there at that time, for different brands of whiskey, would bring different prices—say now, a case of whiskey—state what class of goods you would want—what brands.

Mr. MEYER. The class of goods that you handled.

A. I handled anything that anybody gave me an order for.

Q. What was about your profits, then, on a case?

A. You will have to tell me what kind of goods. If it is going to be champagne, it would be bought at a very high price.

Q. Let us go through all of them. What did you pay for champagne down there?

A. If my memory is correct, $75.00 for champagne.

Q. In 1919, I am confining these questions to.

83 A. A case of champagne sold for $55.00 in Nassau, and sold for $75.00 here.

Q. And about how many cases of champagne did you handle during the year 1919?

A. I could not form any idea of it at all.

Q. Can't you give the jury some idea?

A. I couldn't not tell you.

Q. Did you handle as much as a hundred cases?

A. No; I am satisfied I didn't. Champagne is a very high-priced article. Very few people drink it, and you handle very little of it.

Q. Seventy-five cases?

A. No, sir.

Q. Fifty?

A. No, sir.

Q. Twenty-five cases?

A. No, sir.

Q. How much did you handle?

A. I don't think I handled over ten or twelve cases in the whole year.

Q. Did you handle any Louis Hunter?

A. No.

Q. You handled no Louis Hunter during that year?

A. No.

Q. I think your specialty was Cedar Brook?

A. No. I did not handle Cedar Brook. It was not in existence at that time.

Q. What brands did you handle at that time?

A. Is that a fair question?

COURT. States that it is. The witness need not have gone on the stand if he had not wished to.

A. I think at that time I handled some Canadian Club and various Scotches.

Q. Canadian Club—what was that selling for down in Nassau?

A. Right around $20.00.

Q. And what was it selling for in the States?

A. Around $45.00 or $50.00. I was in the wholesale business. I was not a hip-pocket bootlegger.

Q. That is what I am asking you, what you sold it for; not what the retail price was. You were what is called a wholesale liquor dealer?

A. Yes, sir.

Q. And the Scotches—what did you pay for the Scotches down there?

A. They sold, as a rule, around $17.00 or $18.00, something like that. Some as high as $22.00, according to the brand.

Q. What did you get for the Scotches?

A. About the same thing. A little less money, as a rule.

84 Q. How many dollars would you get a case?

A. That would fluctuate in accordance with the conditions.

Q. Give us some general idea.

A. I think at that time I would get around $45.00, something like that.

Q. And about how many cases of Canadian Club did you handle in 1919?

A. I could not form any idea.

Q. Give the jury some idea. About three or four thousand?

A. Great God! No! I am satisfied that during that year I want to make an honest statement. I don't think I handled over—Oh, maybe six or seven hundred cases.

Q. Six or seven hundred cases?

A. Yes, sir; something like that.

Q. And how many cases of Scotch liquor did you handle during the year 1919?

A. That is the question I just answered.

Q. How many cases of Canadian Club during the year 1919?

A. I just answered—both together, about six or seven hundred in the year.

Q. You mean to tell this court and jury that the total number of cases handled, of liquor, by you, during the year 1919 is how many cases?

A. In the year 1919?

Q. Yes; what was the total number of cases of liquor handled by you?

A. Mr. District Attorney, I was not in the liquor business in 1919 at all. I am figuring on what was done in 1920—those figures I am giving you. I was in the tractor business during the war, and I did not indulge in any liquor business during that time. You remember that at that time the enforcement of the law was in the hands of the U. S. Navy, and when they took it up, I backed out.

Q. You mean to say that you were not in the liquor business in 1919?

A. In 1919 I was not in the liquor business.

Q. Not at all?

A. No; I made that statement a few minutes ago when I told you the only business I was in was the tractor business.

Q. Well, let us see. When did you first go into the liquor business?

A. When did I first go into the liquor business? I was doing a little piking business back in the days of the South Carolina State Dispensary—go over to Savannah, which was open at that time, and bring a little liquor over here.

Q. Were you in the liquor business in the year 1917?

A. That was when we went to war?

85 Court takes judicial notice of the fact that we went to war in 1917—April, 1917.

A. I was not in the business. I was doing some business at the time the war was declared. When war was declared, I quit.

Q. Didn't you plead guilty in the State court in 1917?

A. Yes, sir.

Q. And at that time you received a sentence and a suspended sentence.

A. A sentence, and a suspended sentence, yes, sir.

Q. And after that you didn't quit, did you?

A. After that I didn't quit. I don't believe I did. I did some business after that.

(Afternoon session, Jan. 19, 1926.)

Q. Now, Mr. Sullivan, you say that in 1919, you were not in any business except the automobile or tractor business?

A. Tractor or engine business.

Q. Were you in any beverage business in 1919?

A. Not that I can recall right now.

Q. Are you in a position to deny that you obtained any money either from the freightage of beverages, the sale of beverages or arising out of beverages, in 1919?

A. Mr. District Attorney, that is a long time ago, and I wouldn't like to say whether I did or not. From my present recollection, I did not. It was seven years ago.

Q. You have had a long time to get up that information, Mr. Sullivan. Have you not?

A. I did not know I was going to be tried on it. This thing takes the aspect of being tried for a prohibition case.

Q. You know that this indictment had been pending against you for some time?

A. This income tax case, yes, sir.

Q. And you knew the officers have called upon you to furnish information?

A. Yes, sir.

Q. Did you ever furnish them with any information?

A. I didn't because I couldn't.

Q. Are you able today to give us any information at all in regard to your income tax or any deductions that you should have?

A. Mr. Meyer, the only books that I kept was my bank account. That is the common practice of millions of people in this coun-
86 try. That is the only record I kept and my bank balance at the end of the year shows my financial condition.

Q. Mr. Sullivan, the officers gave you a full opportunity to explain your bank account, didn't they? Let me see those bank accounts. They gave you full opportunity to explain then, didn't you?

A. They gave me first, ten days, and then five days to get up an explanation for three years' business.

Q. Can you tell us where you got this amount of money of five thousand dollars on May 8, which you deposited in the Citizens Bank on May 8, 1919? Where did you get that $5,000.00 from?

A. Do you claim that I deposited that?

Q. Yes, sir.

A. I would think that that was a borrow that I made from one J. M. Huntley—which showed the time that I paid him back: gave him a check.

Q. Have you ever take the trouble to look that up and see whether that was it?

A. I certainly have not.

Q. You were not interested enough in the prosecution or the defense of this case to look it up and ascertain where you got that $5,000.00?

A. Mr. Meyer, knowing that I have done no wrong and that I wasn't guilty of anything, I didn't take the trouble to look up any of that stuff. I knew it would show on its face when I got into court.

Q. You don't know where you got the $5,000.00 from?

A. No, I don't know where it came from.

Q. Could you tell this jury where you got this $2,465.30 from that you deposited, in addition to that, six days later, on May 14?

A. No, sir, I certainly cannot.

Q. You can't tell where you got that from. Can you tell this jury where you got that $1,245.00 from that you deposited ten days later, on May 24th?

A. I don't know that I deposited it, and I certainly could not tell them, if I did.

Q. The bank record shows that you deposited that on May 24?

A. The bank record may show that a deposit was made, but it don't show that I made it.

Q. It went to your account, didn't it?

A. According to that— I was in the tractor business at that time, on Market Street.

Q. You got the benefit of that $1,245.00?

A. The supposition is that I did; yes, sir.

87 Q. About twenty days later, can you tell us where you got that $2,237.63?

A. No, sir. I couldn't tell you anything about it. It is seven years ago.

Q. Can you tell us where you got that $3,000.00 from, one month and ten days later, that you deposited in that bank?

A. I couldn't tell you, sir, couldn't tell you.

Q. Ten days after you deposited $3,000.00 in the bank, I notice there is another deposit of $1,133.00. Can you tell me where you got that deposit from?

A. Couldn't do it, sir. Couldn't tell you where any of those deposits came from. No, sir; I can't remember seven years back, Mr. Meyer.

Q. Could you tell us where the deposit on Aug. 9, of $4,681.09 came from?

A. Couldn't tell you, sir.

Q. Your total deposits for 1919 was $70,932.53. Did you take that into consideration when you made out your income tax return for 1919?

A. For 1919? It must have been taken into consideration. The Government checked over that and found it correct. That was the statement I made. They sent a man there, checked it over and made it correct.

Q. What evidence have you got that the Government checked over that and found it correct?

A. I just remember the man coming there and checking it, that is all.

Q. As a result of that checking over, isn't true that they filed an assessment against you? Didn't you get notice of an additional assessment filed against you for 1919?

A. An assessment was filed at one time, after Mr. Huffington came there.

Q. Answer my question. Did you or not get notice of an additional assessment filed against you after the Government looked over your accounts for 1919?

A. Not until the whole charge was made for 1919, 1920, and 1921, to my recollection.

Q. Well, that is all right. But you got notice that there was an additional tax assessed against you for this year 1919. Is not that right?

A. That was based on those deposits.

Q. Then the Government was not satisfied with that return; is not that correct?

A. They were satisfied with that return, because they came there and checked it over.

88 Q. Well, that is a question for the jury. Will you kindly explain to the jury how it is that you reported your gross income as $44,701.18 and by your deposits for that year in one bank alone you deposited $70,932.53, without taking into account the other bank that you had deposits in?

A. Yes, sir; that is very easily explained.

Q. Well, just explain it to the jury.

A. Gentlemen of the jury, if I bought a carload of tractors or plows or harrows, and I sold those plows or harrows, that money would be redeposited in the bank. More bought, more sold, deposits in the bank. It runs those figures up.

Q. Now, let us see, what percentage of profit did you make on a tractor?

A. It has been a good while since I have been in that business. It is seven years back, I could not said exactly, but I do think Ford never allows a man too much. I think I was working on fifteen per cent.

Q. Then your total income according to this statement, is $44,701.18, isn't it?

A. Total income. That is gross receipts, I think.

Q. Well, gross receipts?

A. If you say that is on the paper, I suppose that is correct.

Q. If those were the gross receipts, how would you figure your profits on that, at 15%?

A. Expenses were taken into consideration, and everything was checked up. The man that I had with me got half of the net profits of that business. I got the other half.

Q. Didn't you set forth your total expenses and deductions on the $44,701.18 as $41,081.93?

A. Is that what it is on that paper?

Q. Yes, sir.

A. If the Government has decided that is correct, it must be so.

Q. You put those figures there, and they are correct?

A. I think they are.

Q. All right. Then on an investment of $41,081.93 you took in $44,701.18 only?

A. If that is on that statement, that is what it was.

Q. Did you freight any liquors or beverages during that year?

A. Not to my recollection. The Navy was enforcing the prohibition law and I was out of it.

Q. How long did the Navy enforce prohibition?

A. I can't recall just now. It was a war-time measure.

89 Q. From what period to what period were you out of the liquor business?

A. That is pretty hard for me to answer—seven years back. All I can answer is that in 1919 when war was declared, and the Navy took over prohibition, I got out of the way. I quit. It was war-time act. I figured that wasn't the proper business and I quit.

Q. Can you show this jury anywhere where you have taken into consideration your deposit of $70,932.53 in the Citizens Bank, irrespective of the other account, in that other bank, the Enterprise Bank, some seventy-seven thousand dollars?

A. Let me get that question again.

Q. I want to know if you can show this jury where you have taken into consideration your bank deposits, some seventy-seven thousand dollars that year, in connection with this income tax return?

A. Mr. Meyer, I was not in any other business, and if that was my deposits for the year (I don't admit that it is) if the Government has claimed that that was deposited, and that was the right deposit, and I have already explained to the jury how it run up that high—and endless chain. You take any man's deposits, and it will do that.

Q. According to your return, the net incomes from your business during 1919 was $3,019.25?

A. My share of it.

Q. Well, your share of it, then. Kindly tell this jury where you got that money to buy that Congress Street property?

A. Yes, sir, I am certainly glad you brought that out. Tell the jury where I got the money to buy it? The truth is, gentlemen of the jury, I never bought it. The truth is that the property was build by Mr. Halsey and the Enterprise Bank. The truth is that Mr. Halsey owed me $500.00, and that $500.00 was the only money that was ever put up for the purchase of that building, and the mortgages carried the rest.

Q. How much did the building cost you?

A. It must have been $8,500.00. The mortgages are $8,000.00, and $500.00 that Mr. Halsey owed me. That was the transaction.

Q. Didn't that building cost you about $17,000.00?

A. No, sir.

Q. It didn't cost you that?

A. No, sir.

Q. Now, Mr. Sulivan, you swore to this income tax return, that is your signature, isn't it, before Mr. Patla, the notary public?

A. Yes, sir.

90 Q. Let us proceed to 1920—No, before we proceed to 1920, let us find out this: Did you get any income from the "Florence" at all, in 1919?

A. No, sir.

Q. Did it cost you any money in 1919?

A. Some expenses; yes, sir.

Q. Will you give us some idea of how much expenses it cost you?

A. A boat is an awful expensive proposition.

Q. Give us some idea of what the "Florence" cost you in 1919?

A. It did not cost me personally anything.

Q. It did not cost you any money?

A. No, sir.

Q. I thought you just testified that you had to pay some operating expenses?

A. I paid those expenses, but that was refunded to me by these Cubans that owned the boat.

Q. How much expenses did you pay?

A. I couldn't tell you that.

Q. Tell the jury how much it cost you to live during the year 1919?

A. I have got a wife and child.

Q. What did it cost you to live? What were your living expenses?

A. I think I lived within the limit.

Q. Give us an idea?

A. About $2,200.00.

Q. It cost you only $200.00 to live, you and your wife and child?

A. I can't answer that, Mr. Meyer. A man does not keep actual expense account of what his living expenses are. I don't think any of us do that.

Q. You don't know how much you spent for that year?

A. No, sir.

Q. You owned the "Swannanoa" in 1919?

A. Yes, sir.

Q. And you maintained and operated that boat? Tell me how much it cost you for you to maintain and operate the "Swannanoa"?

A. It would be impossible for me to answer that question.

Q. What does it cost to maintain and operate a boat like the Swannanoa?

A. According to how many hours you run the steam.

Q. Gove the jury some idea. You know about what it cost to operate that boat in 1919?

A. I could not give you that figure to save my soul.

Q. As much as $1,000.00, $2,000.00 or $3,000.00?

A. It would be impossible for me to answer that question.

Q. You just can't answer that question at all?

A. I can't answer what it cost me.

91 Q. Did you make a penny from the operations of the "Swan nanoa" in 1919?

A. I can't recall it.

Q. You can't recall?

A. No, sir.

Q. You don't know if you made a penny or not?

A. I can't recall it.

Q. Let us come, then, to 1920, and find out something. In 192 did you make a penny from that boat "Florence"?

A. I did not.

Q. Did you at any time handle any money because of the boa "Florence"?

A. Did I at any time handle any money because of the boa "Florence"?

Q. Because of the operations of the boat "Florence"; yes, sir?

A. And after this engine deal was over and the boat turned over t these people?

Q. When was the engine deal ended?

A. Around the first of the year, about the first of 1920. That i about what my memory——

Q. Then you apparently had not more interest, after the first o 1920, in the "Florence," according to your statement?

A. I made a statement that is in the contract to sell this engine I had a year's guarantee on it and had to look after it.

Q. Yes; but you sold the engine in what year?

A. In 1919.

Q. And then—what part of 1919?

A. That is pretty hard for me to recall that.

Q. Was it the first or the middle part of the last part?

A. I won't answer that direct, because I can't; but I think it wa around the middle of the year.

Q. Then about the middle of 1920 you would have no further in terest in the "Florence"?

A. Only that my brother was master of it.

Q. Where is your brother now?

A. In Europe.

Q. How long has he been there?

A. Been there a good while now.

Q. Did you make a penny out of the boat "Florence" in 1920?

A. I did not.

Q. Did it cost you one penny in 1920?

A. Not to my recollection.

Q. What did it cost you to live in 1920, your living expenses?

A. I can't answer that.

Q. Can't you give use some idea of what it cost you to live a year?

A. It is pretty hard for me to tell. I don't drink, I don't smoke, and I don't chew, and the consequence is—what food I eat, and so forth.

92 Q. You travel a good deal, don't you?

A. I have traveled fairly.

Q. How about the "Swannanoa"? Did you make a penny out of the "Swannanoa" in 1920?

A. I am satisfied I did not.

Q. What did the "Swannanoa" cost you to operate in 1920?

A. I couldn't tell you.

Q. Can't you give the jury some idea?

A. No; I can't give the jury any idea.

Q. Whether it cost you one dollar to keep that boat or whether $10,000.00 a year?

A. No; I can not tell you anything accurately about what it cost.

Q. Let us come to 1921. Did you make any money because of any dealings with the boat "Florence" in 1921?

A. I did not.

Q. Did you make any money because of any dealings with the boat "Swannanoa" in 1921?

A. I think that the only money that I earned with the "Swannanoa" was carrying out some fishing parties in Charleston. Very small amount.

Q. Give us some idea of how much it was?

A. Oh, I don't suppose this boat was out of half a dozen times.

Q. About what did you make?

A. I am satisfied at the end of the season, after paying the help and all, I didn't make anything, not a dime. I had the boat for my own use, and that helped along.

Q. Can you give the jury some idea of your living expenses in 1921?

A. No; I could not do that.

Q. Did anybody give you any bequests or any gifts or devices during the years 1919, 1920, and 1921?

A. Make me a present of it? I can't recall that.

Q. Nobody left you any money by any will?

A. No, sir.

Q. Now, Mr. Sullivan, were you in the liquor business in 1920?

A. I think I was.

Q. And what boats did you operate?

A. I can't recall that.

Q. You can't recall the boats that you operated? You operated some, didn't you?

A. I have always got a small boat—always had the "Swannanoa." I can's recall anything more than I operated the boat.

Q. Did you use the "Swannanoa" for hauling any liquor in 1920?

A. No, sir; I did not.

93 Q. About how many cases of liquor did you haul in 1920; the total number of cases of liquor or beer?

A. I have already answered that question.

Q. Well, tell us again?

A. I told you that during that year—I didn't say that I hauled it. You asked me the question, whether I purchased it or not. Six to seven hundred cases, purchased.

Q. Did you make any money for hauling any liquor during that year?

A. I didn't make a dime.

Q. 1921, about how many cases of liquor did you haul?

A. It is absolutely impossible for me to answer that question.

Q. Can you give the jury any idea?

A. I can't give them any more idea than just about the same as the year before.

Q. About how many trips did you make, or you had made by some of your boats, or by boats hired for you?

A. Didn't make anything.

Q. How many cases of liquor did you sell?

A. I made a statement of about the same as the year before.

Q. You sold about six or seven hundred cases of liquor during that year?

A. It wasn't anything, because the bank showed I had an overdraft at the end of that year.

Q. And that is the reason you say you didn't make anything?

A. Yes, sir; that is the only books I keep, and the only check I had.

Q. Did you have any of your liquor captured in 1921?

A. I don't know about any captured.

Q. Did you know of any of your liquor being captured in 1920?

A. When you say captured, do you mean stolen from me or do you mean that the Government captured it or the State captured it?

Q. I mean the Government or the State took it?

A. I don't recall that I made any losses to the State or the Government that time.

Q. During the year 1921 did you receive any money from Mr. Willie Haar?

A. The $20,000.00 that he loaned me for that boat. I don't remember whether it was $20,000.00 or $21,000.00.

Q. In addition to the $20,000.00 did you ever receive any money from Willie Haar?

A. I can't recall it. Nothing more than a loan at different times.

Q. You made loans at different times?

A. Yes, sir.

Q. Did you ever receive any money for hauling freight for Willie Haar?

A. I can't recall it.

94 Q. Did Mr. Willie Haar ever give you any check for any money?

A. I believe that every time I borrowed any money from Mr. Haar, that he gave me a check.

Q. How much money did you borrow from Mr. Willie Haar during the year 1921?

A. I cannot tell you that.

Q. Can't you give us some idea?

A. No, sir; I cannot.

Q. You were not interested enough to look it up?

A. I didn't know you were going to ask me that question. I would have had it ready.

Q. You never received any for hauling any freight?

A. I don't recall it.

Q. What was the last loan you ever borrowed from Mr. Haar?

A. $20,000.00.

Q. What was the next largest you ever borrowed from him?

A. I can't recall it.

Q. Have you ever borrowed from Mr. Haar as much as $10,000.00 at one time?

A. He already made a statement that I borrowed $20,000.00.

Q. Outside of the $20,000.00—let us forget the $20,000.00 for the present. Did you ever borrow $10,000.00 from him?

A. I might have.

Q. Did you ever borrow $5,000.00 from him?

A. I might have.

Q. And you never got any money for hauling any freight?

A. I can't recall it. I might have got it, but I can't recall it.

Q. Let us refresh your memory on that. Do you remember that? Is that your signature?

A. That is, sir; yes, sir.

Q. Look at that, and look at this.

A. For $4,817.00, W. H. Haar.

Q. Payable to whom?

A. M. S. Sullivan.

Q. And what is endorsed on the check at the bottom?

A. Oh, you mean who the check is made out by?

Q. You see what is written on it. Read the check.

A. "M. S. Sullivan, $4,817.00, W. H. Haar. Branch Liberty Street Bank."

Q. Anything else on it?

A. I don't see anything else on it.

Q. You don't see anything else on that? What is written down there, lower right-hand corner? Isn't that Hauling freight"?

A. No, sir; I don't see it.

95 Q. You don't see the words written down there, "Hauling freight"?

A. Oh, yes, sir. Just a memorandum—Judge, your honor, this check is written in ink, and signed in ink by Mr. Haar, and there is a pencil notation on the bottom for hauling *greight*. It is not the same handwriting. It is not Mr. Haar's handwriting.

COURT. The check has not been offered.

Mr. MEYER. What did you get that money for?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. You don't remember when you got that money?
A. No; I do not. It was dated November 1, 1921.
Q. Did you account for that in any income tax?
A. In 1921, no, sir.
Q. You didn't take that into consideration at all?
A. It was taken into consideration in all my banking.
Q. And what is the endorsement on that check?
A. M. S. Sullivan.
Q. What does it say?
A. For cash.
Exhibit #5, check, W. H. Haar to M. S. Sullivan.
A. Kindly look over that check, and see whether you believe that the same man that wrote out that check wrote those words, "Hauling freight." Take into consideration that the man wrote the check in ink and that the words are in blue pencil, and not in the same handwriting at all.
Q. It shows on its face that it was paid in cash?
A. I deny that this was for freight.
COURT. Was the notation on there when you had the check and signed it?
A. I don't think it was. I didn't see it. It wasn't in the same handwriting. It isn't in ink.
Mr. MEYER. Now, Mr. Sullivan, you claim that you lost how much money in 1922, by reason of the capture of the lighter load of liquor down there near Green Island or Long Island—in the capture of the box car full of liquor up here at Harvey's siding—how much did you tell the jury you lost?
A. I never made any statement about that.
96 Q. Tell us now?
A. It would be impossible for me to tell you that.
Q. You can't tell us how much money you lost by reason of the capture of that lighter load of liquor down at Long Island in 1922, and about two or three or four weeks later, the capture of that carload of liquor up there at Harvey's siding?
A. I can't tell you exactly how much my share of that was. It wasn't all my liquor. Other people were interested in it.
Q. Give the jury some idea of how much money you lost by that capture?
A. I have no idea, gentlemen of the jury.
Q. How much was that loss?
A. I can't tell you.
Q. You don't know?
A. No; I couldn't tell you.
Q. You don't know how much interest you had in that liquor?
A. I can't recall just how much.
Q. You can't give us some idea, whether it was five or ten thousand dollars, twenty or fifty thousand dollars?
A. I can't tell you the exact figure; no, sir.

Q. Do you deny that it was as much as $30,000.00?

A. I didn't have $30,000.00, so I certainly could not——

Q. You didn't lose that much, then. Do you deny that you lost as much as $10,000.00?

A. I couldn't give you an accurate figure on that stuff.

Q. Did you lose as much as $10,000.00?

A. I couldn't give you an accurate figure on that, Mr. Meyer.

Q. Give us what is the best of your recollection?

A. There was five or six of us in on that deal. I know it took everything I had. That is all I know.

Q. How much did you put up? How much did you lose by reason of it?

A. I can't recall that.

Q. How much did you take into consideration when you figured your income tax for 1922?

A. That I couldn't answer.

Q. You couldn't even answer that?

A. Between the Government and the State, they had my mind in such a fog that it is pretty hard for me to tell just exactly what took place at that time.

Q. What business were you in, in 1918?

A. Judge, your honor, he is trying me on cases in 1919 and 1921. Shouldn't he confine himself to that?

Q. I want to see what business you were in immediately prior to the *to the in*come tax return you filed that year?

A. I won't answer, unless the judge says I have to.

97 COURT. What is the object of it?

MR. MEYER. To show as to what business he was in prior to the time, so as to see what his business was during these various years starting immediately the year before 1919 tax, and continuing on through the year 1921 tax—did he have any change of business? In other words, when a person starts up a new business, it would naturally take more money than if he was operating the same business for some time prior thereto.

COURT (to witness). Did you have any money at the beginning of the year 1919?

A. I think I had a little, sir.

Q. Do you know how much it was?

A. I couldn't make an authentic statement.

Q. Ask him what business it was, and I will see if it is relevant.

Mr. MEYER. What business were you in in 1918?

A. If my memory serves me correctly, I was in no business at all, but working for Mr. Sottile, Cadillac Co., Cadillac cars; working for a salary, selling Cadillac cars.

Q. Were you in the liquor business at that time?

A. I don't think I was. I am not going to make a statement whether I was.

Q. And how were the profits? You can't give us an idea of how much money you had at the begin'ing of 1919?

A. No. I couldn't tell you just what I had.

Q. How much did you have at the beginning of 1920?

A. The bank deposits show $36.00 overdraft.

Q. But how much money did you have? Did you have any cash, in addition to that?

A. Not a dime.

Q. Did you have any at the beginning at 1921?

A. I think I had $872.00, according to your own figures.

Q. Tell us, please, where you got $8,500.00 cash that you paid on 129 Market Street, on July 1, 1920, when you bought that property for $15,000.00, and gave a mortgage for $6,500.00 on it. Where did the $8,500.00 come from?

A. I deny that that amount was ever paid by me.

98 Q. How much did the property cost, 129 Market Street?

A. The property, I think, was $7,500.00, or may be $8,500.00. Positively not over $8,500.00.

Q. What did 125 and 127 Market Street cost you?

A. I think, according to the evidence you brought out, that was $15,000.00.

Q. And how much did you pay on that?

A. I paid $5,000.00 on it.

Q. Where did you get the $5,000.00 from?

A. That is mighty hard for me to tell you.

Q. You don't know where you got that $5,000.00 cash, from that you paid?

A. I don't remember whether that—see if that is same time I borrowed that money from Mr. Haar?

Q. No; that is April 18, 1921, you got this, and the Haar matter was No'. 1st, 1921. All right, sir. Mr. Sullivan, you don't claim that there are any incorrect entries on these bank sheets, do you?

A. I have objected to every one of those sheets every time they were put in in evidence.

Q. But will you kindly point out to the jury the errors which are in those bank deposit sheets, if you find any?

A. I have never said there were any errors in them.

Q. Do you know of any errors in them?

A. I don't know anything about it. I see sheets of paper produced in the court, claimed to be books of the bank. I see only sheets of paper not signed by anybody. I have objected to them every time they were put up.

Q. When these gentlemen showed you your bank deposits, and asked you if you had any deductions, you didn't tell them of any deductions to be subtracted from these bank deposits?

A. Deductions from the bank deposits?

Q. Did you claim any exemptions or deductions from these bank deposits?

A. That evidence has been brought out, but I didn't tell them anything or give them anything.

Q. Did you admit afterwards either by writing or any letter or any other overt act on your part, or do anything to show the Government that you should have credit for something?

A. Yes, sir.

Q. What did you do?

A. I got on the train and went to Washington, and I appeared before Mr. Allen—not the Mr. Allen that is here, but Mr.
99 Allen that comes next to Mr. Blair. I told Mr. Allen that I had been prosecuted. I told Mr. Allen that I was out of the liquor business—that the Government had entirely reformed me and that I wanted to go straight and do the right thing, and asked him why he had turned down this $300.00 offer of compromise that I had sent in to compromise what they tried to collect from me. Mr. Allen's answer was, after I had explained the whole situation—he says, "Well, Mr. Sullivan, we won't accept the $300.00, as an offer in compromise for the $62,000.00 assessment, but I think that if you sent in a thousand or twelve hundred dollars or fifteen hundred dollars, you would have some luck," and with that he gave me the address of the legal department, and sent me over to the legal department, and I conversed with the head of that department, whoever he was. I told him the same story—that I wanted to go straight, wanted to do right, and that I was out of the liquor——

Q. But that does not answer my question. My question, if you attempted to show anyone, any member of the Government, any representative of the Government, that you were entitled to any deduction from this tax as computed?

A. I believe those people that I talked to were the high officials of the Government in that line.

Q. Did you give them any reasons to deduct anything?

A. I explained to these gentlemen that it was all wrong; that I did not owe a dime of it.

Q. Did you show them any account; did you prove anything to them? Did you attempt to do that?

A. I went there for that purpose.

Q. Did you take any records with you to show them anything?

A. I don't say that I did.

Q. You didn't show a single record?

A. You stopped me before you gave me a chance to explain that.

Q. I want to give you a full opportunity to explain, but don't ramble into something that isn't in response to my question. I want to know whether or not you showed them that certain things cost you so much, or that you were entitled to a deduction by reason of a bequest, or a devise, or a gift—or some specific records, why you were entitled to a reduction of this assessment?

A. I went there to ask for that privilege, and I have tried to explain to you what they told me, and you wouldn't let me do it. I made the trip to Washington for that purpose.

100 Q. Did you take any records to show them anything?

A. I did not take any records, because I went there to ask them to give me that privilege. I didn't show them anything, because they told me this case would have to be cl'ared up before they would accept any offer of compromise.

Q. Now, another thing. You testified about the "Swannanoa" being tied up in 1922. That is after the seizure of liquor down there in June, or July, or August?

A. Just after that: yes, sir.

Q. And then some time shortly after that the boat was taken out on bond: isn't that right?

A. I think it was over a year—about a year after.

Q. Released on bond in about a year?

A. Yes, sir: a year after.

Q. Have you brought here to-day anything to show this jury that you are entitled to any deduction on your income tax matter?

A. No, sir. You did.

Q. You haven't brought anything?

A. No, sir. You brought it all.

Q. There is no question about the fact that the "Swannanoa" was owned and operated by you?

A. In what years?

Q. 1919, 1920, and 1921.

A. Owned and operated—I owned the boat during that time, certainly: yes, sir.

Q. Did you own the boat "Traveler"?

A. No, sir.

Q. And when did you own the "Florence," exactly?

A. Immediately after the war these people asked me to get them a boat and they gave me money to pay for that boat, and I had it in my name during 1919, some time—had it changed from steam to gasoline. That was the "Florence."

WILLIE HAAR, recalled.

By Mr. SULLIVAN:

Mr. Haar, were you in the court room yesterday when this poor fellow Russell was on the stand?

A. Yes, sir.

Q. And did you hear him swear that he went to the "Florence" in 1919?

A. Yes, sir.

Q. And he swore that he took off a load of liquor in 1919 and that he didn't see me there, but that night, or some time afterwards, he saw me in Goldberg's house, and saw a man named Mackenzie

101 pay me nine thousand dollars. Did you hear that?

A. I believe I understood him to say so: yes, sir.

Q. Mr. Haar, you had quite some business during that time at Brunswick, during the year 1919?

A. Yes, sir.

Q. Paid many visits there?

A. Yes, sir.

Q. And you went to the Brunswick Construction Company every time you went there?

A. Yes, sir.

Q. I wish you would tell the jury whether or not the British boat "Florence"—or she was not British at that time—whether or not the yacht "Florence" was not in that shipyard that entire year, changing her equipment from——

Objection.

Mr. MEYER. Leading.

Sustained.

Q. Was it under repair?

A. Under repair in dry dock during 1919, at Brunswick, Ga.; yes, sir.

Cross-examination by Mr. MEYER:

Look at that check, Mr. Haar. Is that an original check of yours?

A. Yes, sir.

Q. And what is the notation on the check?

A. That says, "Hauling freight," I guess. The word "freight" is abbreviated.

Q. Do you know whose handwriting that is?

A. I do not.

Q. You don't know whose handwriting that *that* is?

A. No, sir.

Q. Do you know what that check was given for?

A. Off-hand, I don't know. It might have been given to Mr. Sullivan's brother. I don't know—for freight that he hauled for me, and I don't know who put this on there. I didn't put it on there.

Q. You don't know whose handwriting that is?

A. No, sir; I do not. It isn't my brother's handwriting.

Q. That was an original check that came from your custody, didn't?

A. Yes, sir; given by me; yes, sir.

Q. What was the usual custom in handling payments 102 for freight aboard the "Florence"? Was it not customary to make checks sometimes payable to M. S. Sullivan for hauling freight?

A. Some of the checks were made to M. S. Sullivan, and checks were given, though to his brother. Because his brother would be the one that would bring the freight and would be paid for the freight.

Q. And the checks were made out in the name of M. S. Sullivan and given to the brother for hauling freight?

A. Yes, sir. I wouldn't say that all of them were made that way.

Q. No; but I mean some were made that way?

A. Yes, sir.

Q. And do you know why?

A. I don't know; possibly his brother might have requested to have them made that way. Possibly that is the way it was made.

We would ask his brother, possibly, if he wanted cash or a check. Sometimes, possibly, he would be paid in cash; other times he would be paid in a check.

Q. And on several occasions it was asked that the check be made to M. S. Sullivan?

A. At different times, I suppose it was; yes, sir.

Q. Now, Mr. Haar, of course you don't know that the "Florence" was laid up every day of the year 1919, do you?

A. The only way I know that, I was down at Brunswick in 1919. I went down to see Mr. Sullivan about hauling some whiskey for me from Nassau. I had 1,200 cases of bottled in bond.

Q. What time of 1919 was that?

A. I don't know. I guess about possibly in the middle of 1919. No; it was later than that, around during Christmas time, two weeks before Christmas. I had 1,200 cases of bottled in bond that I had exported from Kentucky over to Nassau, and I went down to see Mr. Sullivan about hauling the whiskey to Savannah for me.

Q. And that is the only time you saw her up on the ways? Is this right?

A. No, sir; I was over there a couple of times before that time—it was on the ways, but it was on the dock, for she had some engine trouble, and they said she couldn't make the trip.

Q. As a matter of fact, he frequently had engine trouble?

A. Well, he had off and on.

Q. So it wasn't anything out of the ordinary for him to have engine trouble and to be laid up at Brunswick some of the time?

163 A. I don't know about that. I went over there three different times, and each time I went over there, he said he couldn't make the trip for me. The bottled in bond was finally brought to me some time in 1920, and that is the first trip the "Florence" ever made, the first one I know.

Q. But of course it was possible for that boat to have made other trips prior to that time?

A. It was possible that it could have made other trips, but I guess I would have heard of it if it came up to Savannah.

L. A. JONES, recalled.

By Mr. SULLIVAN:

Mr. Jones, you were on the stand yesterday, and under oath on that stand, you told the court and the jury that Mr. Huffington made out that case against me, didn't you?

A. I said Mr. Huffington had charge of the case when I came down here. I was assigned to Mr. Huffington; had instructions to come to Charleston to work with Mr. Huffington; and he had charge of the case.

Q. That is right, sir; he had charge of it. Now, Mr. Jones, what I want you to tell the jury is: Do you know where Mr. Huffington is now?

A. No, sir.

Q. Do you know whether he is with the Government or not?
A. No, sir; I do not.
Q. Do you know whether or not Mr. Huffington was discharged from the service of the Government for crooked work?
COURT. That would not be admissible. Mr. Huffington has not been on the stand, and he has not testified.
WITNESS answers. I do not.
Mr. SULLIVAN. You told the court and jury, Mr. Jones, that Mr. Huffington had charge of this case? Mr. Huffington was the man that went to the banks. He is the man that got every bit of that evidence together from which they made out this case, this assessment against me, and when I couldn't pay the assessment, they put perjury charges against me. Now, can you tell the court why the Government has not produced this man?
A. I cannot, sir.
Q. You don't know why the Government failed to produce the man that put in all the work, and got all of the evidence
104 against me, that ran this assessment up to $62,000.00? You can't tell me why they failed to put that man on the stand?
COURT. You have asked him that. That is sufficient. He says he doesn't know why the Government did not bring him.

Cross-examination by Mr. MEYER:

You were in the same department as Mr. Huffington?
A. I was.
Q. And Mr. Clowe is not in your department?
A. No, sir; he is not.
Q. Isn't that correct?
A. That is right.
Q. And the Government is divided into difference departments in handling different features of the case?
A. That is right.
Objection, Mr. Sullivan, as leading. Overruled.
Q. Did you know whether the case was first Mr. Huffington's case or Mr. Clowe's case?
A. I do not. I just had instructions from the office to go and work with Mr. Huffington in Charleston, and when I got here I found him working on that case.
Q. As far as you were concerned, Mr. Huffington was your superior officer?
A. Absolutely; I was working with him.
Q. Mr. Clowe was in a different department?
A. I had nothing to do with Mr. Clowe's work.
Q. I asked you Mr. Jones, if it is not the usual custom for these special agents of the Special Intelligence Unit to have agents from your department to handle specific instances like income tax returns?
A. I have known of instances.
Q. And they have general charge of the case. Isn't that right?
A. Yes, sir.

J. D. E. MEYER.

Direct examination by Mr. SULLIVAN:

105 Mr. Meyer, I would like to ask you some questions. Can you explain why the Government failed to put the man—in other words, my accuser, why you failed to put my accuser, Mr. Huffington, on the stand?

A. The reason we never put Mr. Huffington on the stand was for two reasons. The first reasons, he was not in charge of the case. Mr. Clowe was the original man in charge of the case; and secondly, due to the same reasons as when we have bank cases, we call an accountant in to get the figures up, so in a case of this nature, we called upon the Internal Revenue Bureau, for agents similar to Mr. Jones to get up the figures, and it would be unnecessary to put two of them up. For the further reason that it was found, as a matter of fact we have absolutely nothing to hide in the case, it was found that Mr. Huffington had fallen in love with a second woman, and for that reason he was discharged from the service, because he is not entitled to have two wives—and for that reason we never called him up—because it was unnecessary to call him up, when we have other testimony of the man who actually worked the whole thing, who really knows more than Mr. Huffington, and that is Mr. Clowe.

Q. You didn't put him on the stand because he is a bigamist? Do you or do you not know whether or not Mr. Huffington was discharged from the Government for crooked work?

COURT. That wouldn't be admissible. Mr. Huffington has not been put on the stand. All that you are entitled to ask is why the Government did not bring him here.

E. D. BUCKLEY.

Direct examination by Mr. SULLIVAN:

Mr. Buckley, will you tell the jury what position you hold with the U. S. Customs Service here with the Internal Revenue Dept.?

A. I am deputy collector of internal revenue, and my duties are to make up income-tax returns, auditing of books and accounts for various people. Now and again I serve warrants for collection of income tax.

106 Q. I want to ask you this question: If you had been put on the job to investigate, as Mr. Huffington did, my income tax——

A. I don't know that Mr. Huffington has investigated your income tax.

Q. Would you mind telling the jury how you would proceed to do that?

A. I would get your receipts and expenses and take the expenses from the receipts, and that would be your net income, and then give you credit for exemptions and dependents, and multiply by the percentage of the tax.

Q. But you wouldn't have gone to my bank and take my total deposits for three years and from that total figure of three years' deposits you wouldn't have declared my income and taxed me on that?

A. I have taken taxes from bank deposits, and in the case of a man engaged in an illegitimate business I have used his total deposits as a net income, but in the case of a man engaged in a legitimate business and in bootlegging I have allowed him to deduct his expenses in the case of his legitimate business. But total deposits have been used many a time.

Q. I see; but that was simply to get the information, that is all, and then you would give a man ample time to make up his expense account against that. Would you call fifteen days ample time for a man to get up three years' business, to make returns?

A. I guess the man that handled that case, the agent, would be the man to tell that. He knows the circumstances. I don't. I don't know anything about your account.

Q. Do you think that is a reasonable time?

COURT. I don't see that that makes any difference in this case, because you have the opportunity here to-day; and even if he didn't give it to you, the court has given it to you.

Mr. SULLIVAN. Did or not Mr. Huffington come to you and make overtures to you to hold up the returns in my case?

A. I refuse to answer that question.

Court sustains witness and excludes question: "We can't go into Mr. Huffington's conduct. He is not on the stand, and the Government is not relying on him."

Exception, Mr. Sullivan.

107 Q. But if you handled that case, you would have given me a chance to put in all my expense account, put in everything that I had, and then you would have declared my income from that, after that?

A. I would. Yes, sir.

Cross-examination by Mr. MEYER:

Suppose a man told you that he didn't keep any books because books would get him into trouble, and that he had no records? What about an extension of time in that case?

A. Well, it is not customary to give extensions of time at all. We generally go and examine the books and allow the man a reasonable time. They send me to Charleston and Columbia, and they don't want me to stay in Charleston a week on a case that takes three or four days; but, after weighing all the circumstances, we give as much time as we can.

Q. Insofar as this particular case is concerned, you don't know anything about it, do you?

A. I don't know a thing, except that the warrants came through my office and an offer of compromise was subsequently made of $300.00. That is all I know.

Redirect examination by Mr. SULLIVAN:

Mr. Buckley, did or did you not after these—I think you call them—warrants charging me with this $62,000.00 came through your office, it was up to your office to collect them then?

A. That is right.

Q. Didn't you go to every bank in Charleston to try to find some money that I had somewhere, so you could grab it, or anything else that I had?

A. I did. I went everywhere to see what property you had, and Mr. Dial and I went to see if you had a boat—made a trip to Jacksonville to see if you had a boat. It was our duty to serve those warrants and get any property and seize it and sell it.

Q. After you searched Charleston County, and went down to Jacksonville, you found I had nothing?

A. I found that you had a boat at Miami, and the U. S. marshal had seized it previously—it had already been seized on a liquor warrant.

108 Q. And the Government actually had it, but I was down there using it under bond?

A. I don't know what was being done, but I found that I couldn't seize it for the satisfaction of the warrant I had.

Q. What I want you to tell the jury is this, have you made a thorough search, assisted by your friend?

A. Assisted by Mr. Dial.

Q. You made a thorough search of the banks, a thorough search of the real-estate books—you made a thorough search of everything, and you couldn't find a dollar in the bank and you couldn't find a piece of real estate in which I owned an equity over a mortgage that would permit you to go there and take it and sell it?

A. That is right. As well as I remember you owned a piece of property on Market Street and it had been sold just about that time for mortgages or debts or something.

Q. Had foreclosed on it and sold it?

A. I don't know how it was, but you told me it didn't bring the mortgage.

A. And any other property I had an equity in, there was a mortgage on it for more than it was worth and it wasn't worth while the Government seizing it and selling it?

A. That is right; yes, sir.

COURT. When did you make this search for the property? What year?

A. I don't know, but I can tell you from the records.

Q. Just see when.

A. This offer of compromise, $300.00, was submitted on December 12, 1923, so that was previous to that time—maybe some time. It would take two or three——

Q. Was it in 1923?

A. Yes, sir; some time in 1923.

Defense closes.

No reply.

Motion for directed verdict

Mr. SULLIVAN. I am going to ask your honor for a directed verdict, in favor of the defendant, for the reason that the Government has entirely failed to produce any evidence where I have made a dollar more than I was entitled to make an income tax return on. They have brought out by their own figures and their own witnesses
109 that in 1919 that I made a legitimate income tax—I proved to them that the Government examined that income-tax return and found it return; and if my memory serves me, that is the year in which they charged me with perjury. But, your honor, at the end of the year, when the time came, by the only books that I keep, which is a common practice with thousands and millions of people, was my bank account. The account showed them, their own figures, that I had only $1,000.00 in one bank and $1,600.00 in another, and I am a married man and was entitled to $2,200.00. Under those conditions, a man that didn't earn for the year more than $2,200.00, which I was allowed, didn't have to make an income-tax return.

Further, in the year 1920, while they built these figures up to a very high point, when the end of the year came again, according to their own figures, and their own statement, they only proved at the end of 1920 that I was short in the bank, had an overdraft of $36.00, and I was entitled to $2,200.00.

At the end of 1921, according to their own figures brought out here, I only had at the end of that year $872.00 in the bank, and I was entitled to $2,200.00.

In round figures, your honor, in the three years in which they have got me charged, they only showed a profit on my side of the ledger of $2,400.00, and I was entitled to $2,200.00 each of these years.

I also feel, your honor, that the method of taking a man's bank deposits and piling them one on top of another until it becomes a mountain, is very unjust and unfair, and I believe, an illegal proceeding, to get at a man's income, and if I am informed correct, the law says that a man in an illegal business, that his gross income is declared profit; but I don't think that the law says, your honor, that his bank deposits could be declared a profit; and if it does say so, it certainly gives a bootlegger the rough side of it.

Under these grounds, your honor, I pray that your honor will direct a verdict in favor of the defendant; because the Government has certainly failed. They started out and made a charge that I gotten $5,000.00 on beverages, but up to the present minute, they have failed to produce any evidence to show that I have made a
110 dollar on it; and for those reasons, I pray you will take that into consideration, your honor, and render a verdict in my favor.

(U. S. attorney argues in reply to motion.)

(Morning session, Jan. 20, 1926.)

COURT. I have made what investigations I can of the law of this case—given it pretty serious and full consideration, and under the

law I will let the case go to the jury, and let the facts be passed upon by them. I don't care to discuss the facts or give any reasons for my opinion at this time, because I am going to leave it to the jury to pass upon the facts themselves. The motion is refused.

Exception, Mr. Sullivan.

Arguments were thereupon made by Mr. Meyer on behalf of the Government and by Mr. Sullivan on behalf of the defense and a reply argument by Mr. Meyer.

The court thereupon delivered the following charge to the jury, to which no exceptions were taken.

In the District Court of the United States for the Eastern District of South Carolina

January, 1926, term, Charleston, S. C.

The United States vs. M. S. Sullivan. Violation Section 125, C. C. Violation Act of Feb. 24, 1919

Charge to jury Jan. 20, 1926

Mr. Foreman and gentlemen of the jury: You and I have
111 certain duties and functions to perform in this case under our oaths of office. My duty is to state to you the law applicable to this case, and it is your duty to take from me what I state to be the law, as the law of the case. You are to pass upon the facts of the case. It is your duty to find what the facts are, and upon the facts and the law, as you apply the law to the facts, render your verdict. I have the right in this court to state to you the facts, to state the testimony and the evidence, to comment upon the facts, and even to give you my opinion upon the facts; but if I should do so, and you should gather what my opinion is, you will understand that I have commented upon the facts or give you my opinion upon the facts or any of them, simply for the purpose of assisting you to arrive at a correct conclusion, and that you are not bound by my opinion upon the facts, but you are bound by my opinion upon the law. You are the sole final judges of the facts. I will say also, Mr. Foreman and gentlemen of the jury, that if in stating the testimony to you your recollection of the testimony is different from my statement, then you are not bound by my statement of the testimony, but you will follow what your own recollection of the testimony is.

Now, gentlemen, the defendant in this case, like the defendants in every criminal case, comes into court with the presumption of innocence in his favor. That presumption remains with him until from the evidence upon the stand the jury reach the conclusion that the Government has made out its case beyond a reasonable doubt. Whenever the jury become so satisfied beyond a reasonable doubt that the charge or charges have been made out, the presumption of innocence is overthrown, vanishes, goes out of the case, and it would be your duty to convict. A reasonable doubt, gentlemen, is almost self-

defined. It is not any kind of a doubt that might suggest itself to the mind of man, for man has a very fertile imagination, and many men have all kinds of doubt about the most commonplace things of life, but it is not that kind of doubt. It is a reasonable doubt, a doubt that grows out of the testimony or the evidence or the lack of it—a doubt which would make you pause in some important affairs of your own life and business, and hesitate and refuse to act, on the ground that there is a doubt, and that you have a reason for
112 that doubt. It is a doubt for which there exists some reason—a reasonable doubt.

Now, it is the duty of the Government, as I have stated, to prove its case and every material allegation of its charge, beyond a reasonable doubt; and it is your duty to give the benefit to the defendant of any reasonable doubt you may have upon any material charge essential and necessary to make out the case.

In this case the defendant has gone upon the stand and testified in his own behalf, as he had a right to do under the law. You are not to discard his testimony simply because he is a defendant in the case. The law gives him the right to testify, and if his testimony is to be discarded simply because he is the defendant, his right would be worthless. But, gentlemen, I charge you that the Supreme Court of the United States has held, and I am bound by it, and you are bound by it, and it is the law, and it is obvious common sense, that in considering the testimony of the defendant that he has given to you upon the stand you have a right to take into consideration the fact that he is the defendant and his interest in the outcome of the case. You have a right to consider that he has a deep personal interest in the outcome of the case, and you have a right to consider that fact in weighing his testimony, and judging whether you will believe it or not, and whether you think his interest in the case would or would not cause him to swerve from the truth in order to exculpate himself.

Now, gentlemen, I charge you that the credibility of the witnesses is for you. You are to judge of whether you believe the witnesses for the Government or the defendant, or any of them, upon any particular matter. I charge you that in weighing the evidence you have a right to take into consideration—in weighing evidence, not only of the defendant but of all the witnesses or any of them in the case—you have a right to take into consideration their demeanor upon the stand, the kind of men in life that they appear to be, as shown to you from the evidence, their condition in life, and habits of life, as the evidence may disclose it to you—their frankness (if you find that they were frank) in testifying, or their lack of frankness (if you find they were not frank). All of those things
113 you will take into consideration and weigh all the circumstances in considering the credibility of the witnesses, and in passing upon any and all of the facts of the case.

Now, gentlemen, I think it proper to say at the outset that there has been some suggestion here about certain witnesses as to where

they were born, and to their being from a certain section of the country. I don't think it necessary to say to this jury—I believe if there ever was a day in South Carolina when jurors would render their verdicts because of the residence or birthplace of any witness, or where he came from, I believe that day is past, if it ever was here. If a witness is worthy of belief, it does not make any difference whether he is southerner to the manner born, or not—he may have been born in Kamschatka—if you see him upon the stand and hear his evidence, and you believe him, as intelligent men you know that these things have nothing to do with your verdict.

So also the defendant in this case has spoken to you of his lack of having counsel and of his appearing for himself. I charge you, gentlemen, that he had a right in this court to appear for himself or to appear by counsel. I charge you, however, that if you find from the facts of the case that the Government has made out its case and that he is guilty, that neither you nor I have any right in this court to allow ourselves to be governed by sentiment and to let him escape if he is guilty, because of the fact that he is not able, or has not seen fit to employ counsel. I charge you that this court has endeavored, in view of the fact that he has not any counsel, to give him every latitude that is possible under the law and my sense of duty, and in considering his case, that he is here without counsel, you may for that reason scrutinize and consider the evidence carefully and reach your conclusions as I have stated, beyond a reasonable doubt. But if you reach that conclusion, no sympathy for the defendant should allow you to render any other verdict than what your conscience directs you should be rendered.

I also charge you, gentlemen, that when you reach your conclusions, you should render your verdict without regard to the consequences, either to the defendant or to the Government. Whatever those consequences may be, you have your duty to perform and
114 I have mine, and whatever the consequences may be, either to the Government or to the public at large, or to the defendant, that is not for us. We are here to find a true verdict and render a true judgment.

Now, gentlemen, let us see what the defendant first is charged with. What are the issues in the case, or cases, because there are really three separate and distinct transactions.

The first case, or transaction rather, is based upon the defendant's alleged income and profits for the year 1919. That is made the basis of two indictments here against him, one found in what is called the perjury indictment and the other in the first count of the indictment under the revenue act. I charge you, gentlemen, that these two indictments, the one for perjury, and the one under the first count of the indictment under the revenue act, grow out of the same transaction and are based upon the said transaction, but that they are entirely separate and distinct offenses, and that the defendant may be guilty of both of them, and as I shall later charge you, in my view of the case if he is guilty upon the one of perjury,

then it is difficult under this particular evidence to see how he could fail to be guilty under the first count of the indictment of the revenue act and vice versa. But I will leave that question to you, and charge you upon that a little later.

Now, the charge of perjury is in substance this: That the defendant, the Government alleges in the perjury indictment, was under an obligation to make an income-tax return during the year 1920 for his income for 1919, and that he made such return and swore to it before a notary public, which is an oath that the law requires to be administered. The Government further alleges that that oath of his was wilfully false and corrupt; that in that oath he subscribed and stated certain matters which he did not believe to be true—that he stated in there that his net income was $3,019.25, when the Government alleges in the perjury indictment that instead of making only $3,019.25 profits from his automobile agency that he, defendant, in fact from the profits of his sales of beverages in the year 1919 made $5,000.00 profit. Now, gentlemen, that is the charge in the perjury indictment.

115 In the indictment under the internal revenue act, the first count is based upon that same transaction. The Government charges in the first count of the indictment under the internal revenue act that the defendant was under a legal obligation to make his return for the year 1919 of his income during that year; that he made this return and wilfully evaded, by making a false return—that he attempted to evade the payment of the taxes on $5,000.00 of net income and profits from the sale of beverages—it being alleged that he made the return for 1919 showing $3,019.25 when he should have made it for $8,000.00 and some odd dollars, and that thereby he wilfully attempted to evade and defeat the payment of the taxes. That is the charge on that. That is under the revenue act of 1918.

Now, the second count of the indictment, also based upon the internal revenue act of 1918, particularly refers to the income of the defendant which the Government alleges he had made in the year 1920. It is alleged that the defendant was under a duty (having a net income of more than $2,000.00 for the year 1920)—that he was under a duty to file a return under oath of his income and a statement of his expenses and so forth during the year. The Government further alleges that although he had, as the Government claims during that year of 1920, a net income of more than $2,000.00, he wilfully refused to file that return and wilfully refused to make it.

Now, the third count of the indictment is a little different again. The third count of the indictment under the internal revenue law is based upon a new revenue act, the revenue act of 1921; and it charges that the defendant was under a duty, because of the fact that he had a gross income of more than $5,000.00 and a net income of more than $2,000.00, to file with the Government, or the proper officers of the Government, a return of his income for the year 1921. The Government charges that he had actually an income during that year, a net

income of more than $2,000.00 and a gross income of more than $5,000.00 and that he wilfully refused to make the return, or make any return at all during that year.

Now, the defendant has denied by his plea of not guilty, all of these charges, and those are the issues for you to try. Each
116 one of them is in effect a separate indictment and charge, but the perjury charge and the first count of the indictment are based upon the same transaction for the same tax year of 1919.

Now, gentlemen, I charge you, in reference to perjury, that whenever a person, in any case in which the law of the United States authorizes an oath to be administered, having taken that oath before a competent tribunal or officer or person, that he will testify, declare, depose, or certify truly that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall wilfully and contrary to such oath state or subscribe to any material matter which he does not believe to be true, is guilty of perjury.

I charge you that it is conceded here—the defendant himself admitted—that he swore to this return that was filed by him. I think he said that on the stand himself, and it is certified to by the officer. The regulations of the department, I charge you, prescribe that an oath in such case may be taken before a notary public, and I charge you also that this statement of the amount of his net income in that return is a material matter, sufficient to satisfy the statute, so that the real question for you to decide, under that perjury charge, is whether this defendant wilfully and corruptly and knowingly left out of that return the net income which he had made during the year 1919, and which ought to have been in that return. If you find that he did have a net income during that year of 1919, which is not disclosed in the return and not included in this $3,019.25, and that he failed to put it in there, that he did that knowingly and wilfully—intending not to return it to the Government, and not to pay the tax, then I charge you that he would be guilty of perjury under that section of the statutes.

Now, let us see what is the definition of evasion under the first count of the internal revenue act. The law, gentlemen, in order that the income tax may be fair, as fair as is humanly possible to make it (that is the ideal which the law seeks), as equal upon all persons as possible, and that all shall bear their part and shall pay the part that the law says they shall pay, requires every person who is liable for this tax to make a return and it is his duty, under the law, in making that return, to state the facts truly, which are material, for the Government to ascertain whether or not he is liable to pay
117 a tax, and if so, how much. So that I charge you, gentlemen, that in this case, the defendant was under a duty, according to his own return and statement here, as to the year 1919,—and was under a duty to make that return and to state in there the facts which bore upon his income of 1919. The defendant did that much, and he made his return, and the Government alleged that he wilfully left out certain items of over two thousand dollars profits from bev-

erages, which the Government says ought to have been included. I charge you, gentlemen, under the revenue act of 1918, that if a person, being under a duty to file a return, files such return and in such return knowingly and wilfully leaves out certain net income which should have been placed in there and does it for the purpose of evading and defeating the tax, he is guilty of an offense, as charged in that first count of the indictment.

Now, likewise, under the revenue act of 1918, coming to the second count of the indictment, under that act, I charge you that a person who makes or has made, or did make during the year 1920, a net income of $2,000.00 or more, he being a married man, and having a net income of $2,000.00 or more, it was his duty to make a return, setting forth the facts of his income and of his deductions that he may claim, if any. I charge you that under that law, if a person had an income and under this particular second count of the indictment, during the year 1920, being a married man, had an income, a net income, of $2,000.00, or upwards, it would be his duty to file a return, showing his income, gross and net, during that year, and any deductions he might make, and that if he wilfully refused to make such return, and did it for the purpose of evading this tax, he would be guilty under that second count of the indictment.

Now, I charge you that under the third count of the indictment, which comes up under the act of 1921, if a person has a net income, or did have a net income during the year 1921, of $2,000.00 or upwards, or if he had a gross income during that year of $5,000.00 or upwards without regard to his net income, then in either case it would be his duty to file a return, setting forth his gross income and his net income and his deductions, if any he claimed, and that if he wilfully refused to file such return, that would be an offense
118 against the law—if he did that, and did it for the purpose of evading this tax.

Gentlemen, upon the question of wilfulness, you will observe that in every one of these counts of the indictment, there is a charge that it was done wilfully; and I charge you that wilfulness is an essential element in all of these counts of the indictment, both in perjury charge and in the three counts of the other indictment. Wilfulness, gentlemen, I charge you, means if a man does a thing knowingly and intentionally, the law presumes that a man intends the natural and probable consequences of his acts; and if a man has an income which requires him to make a return and he knowingly leaves out of that return a part of his income for that year, with the intention of defeating the tax, or if he, being under the obligation to make a return, fails to make that return when he knows that he made the income and ought to have returned it, I charge you that the jury would be warranted in inferring that he, knowing the natural and probable consequences of his act—the jury would be warranted in saying that he must have done it wilfully, if it did it knowingly and intentionally, knowing the consequences which might follow, and it is presumed he would know the natural and probably consequences.

Now, gentlemen, let us see what is income. I will give you the language of the Supreme Court of the United States, which on these matters is the law for us all: "Income may be "defined as gain derived from capital, from labor, or from "both combined, provided it be understood to include the "profit gained through a sale or conversion of capital assets also."

Now, then, what is gross income? Under all of these acts, gentlemen, gross income includes gains, profits and income derived from salaries, wages or compensation for personal services, including in the case of the President of the United States the judges of the Supreme Court and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii.—Compensation received as such, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales or dealings in property, whether real or personal, growing out of ownership or use of or interest
'19 in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

Now, gentlemen, you will see that that is pretty broad. You will notice there that the words are comprehensive of all kinds of gainful business and occupations. There is no exception in favor of a man who gains his money by violations of the law. Indeed, I could hardly conceive that any legislature or Congress would ever intend to exempt a violator of the law from paying his ill-gotten gains, or part of them, to the State, as a tax on income. I charge you, gentlemen of the jury, that it makes no difference how a man makes his money, how his income comes in, and from what source, whether legal or illegal—he is under a duty to the Government to pay his share from its gains, whether gotten honestly or whether ill-gotten.

Gentlemen, the Government has requested me to charge you that where a man who is engaged in an illegal business, his gross profits would be hit net profits, or rather that there would be no deductions. I cannot charge you that, gentlemen. I think the law is intended to make payable a certain per cent of the income, and that there can be charged off, even in an illegal business, the losses and expenses proper and incident to that business. Now, whether or not there is any evidence before you in this case of any such losses or expenses, is a different question, as to which I shall charge you a little later. To ascertain the net income, gentlemen, the law allows a man engaging in business during a calendar year, to take out the expenses of that business. He is also allowed certain deductions where he gives a certain amount to charitable institutions; also he is allowed, if a single man, a deduction of one thousand dollars, and if a married man, a deduction of two thousand dollars, under these acts. In reference to these matters, I charge you, gentlemen, that the net income is the amount of gross income that a man receives during the year for which his return is made, or should be made, less the expense of that business, if it is a business, and less the losses that may be

incurred in that business, and less any charitable contributions that he may have made, within the terms of the statute—that that would be his net income for any particular year.

120 I charge you also that the year, as a general rule, is the calendar year that is made the basis, unless the taxpayer himself fixed his own fiscal year as the year upon which to make his return. In this case, however, there is no evidence that the defendant fixed any other time than the calendar year as a basis for his return. So that the income will be determined upon the calendar year.

There is one matter, gentlemen, upon which I particularly want to charge you, in order that there may be no misapprehension in your minds, as to what legal effect there may be in reference to that matter. A great deal has been said here, and especially by the defendant, about the assessments made against him. Now, gentlemen, I charge you this: Under the law, the assessing officers have a right, if a man makes a return which they claim is incorrect, or if he makes no return, they have a right to call upon him for facts and data and to obtain information as best they can, and assess against him the proper tax. That assessment, however, is to be collected in a civil suit against him, where he would have an opportunity to present his claims of defense and show that the assessment was not correct. I charge you, gentlemen, that the assessment has no effect whatever in a criminal case, or in this case, the particular assessments here. The only reason that any evidence was admitted at the outset on the part of the Government in reference to those assessments, was that the Government was permitted to show that this defendant was called upon—there was testimony on the part of the Government tending to show that the defendant was called upon to explain his bank accounts and to give any deductions or losses that he might have claimed in his business, and that thereupon an assessment was made against him, and that the defendant made no objection to the assessment. The Government was not permitted and I would not have permitted the Government to have introduced evidence as to the amount of those assessments—and you will recall that at the time I told the jury that it was admissible only upon the question for you to consider as to the defendant whether he made any objection to there being an assessment against him. The defendant himself, however, when he went upon the stand, testified voluntarily to

121 the amount of those assessments. He denied that he did not object. He said that he wanted to claim more time, and that he went to Washington and there stated that the assessments were incorrect.

Now, gentlemen, I charge you that you have no right in this case to base your verdict upon those assessments. It does not matter whether those assessments are correct or not. You are not to be bound in your verdict by what the commissioner did. The fact that he made the assessment is no evidence before you to-day that the

defendant ought to have made a return; and likewise the fact that he made an assessment which may have been erroneous is nothing to show, and not to be considered by you, in determining whether the defendant ought to have made a return. Those matters, as I view it, of the assessment are immaterial, and the only question for you to consider is whether the defendant objected to an assessment as throwing some light upon the question of whether he was liable or not. He says he did object. They say he did not. It is a question for you. But upon the assessment itself, you are to disregard that as binding you in any way upon your verdict.

Now, gentlemen, there are one or two other matters which I should charge you are immaterial. The law, gentlemen, fixes the calendar year, or in the case of a business man who chooses to make a different fiscal year, as the period within which to ascertain his net income, his gross income, and his losses. As I stated to you before, in this particular case the defendant has not shown that he had any fiscal year, but, on the contrary, he adopted in the one return he made, the calendar year. For the other years, there is no evidence that he had any fiscal year for his business. I charge you that when a man in one calendar year has an income, it is his duty, under the charge that I have given you, if it reached the proper amount, to make his return and to pay his tax upon that income. He has no right to stand back when he has made money in one year and hold it back for future losses in another year. In that connection, I charge you that the defendant's testimony to the effect that he had had large losses in 1922, is not to be considered by you in determining whether he had an income which was taxable in 1919, 1920,
122 and 1921. As far as I recall, the only evidence that the defendant presented to you of any losses was in 1922, and that was after all of these tax years had expired. Therefore it is not to be considered by you—his losses for that year—as determining whether he had an income in the previous three years which these transactions covered. I also charge you, gentlemen, that it is a man's duty to make his return, if he is liable to make a return, and to make it truly, as I have stated, and that if he makes money during one calendar year and has an income upon which he is liable and fails to return that properly and honestly, as he should, then the fact that he afterwards became impoverished and is unable to pay the tax is no reason to excuse him from the failure to make a return; and it is no reason for the jury, if he is guilty of failing to make a return, either in 1919, 1920, or 1921, to excuse him and find him not guilty now because he has not now the money to pay the tax.

Now, gentlemen, another thing, because I want to get rid of these immaterial matters in a few minutes and come down to the real issues of the case. The defendant has testified and a good deal has been brought out here, about his offer of compromise of the assessment that was made against him and of the refusal of the commissioner to accept that offer; and he testified, I believe, that the commissioner, or some one representing the commissioner, told him that

this criminal case must be finished first. I charge you, gentlegen, that the commissioner of internal revenue has authority under the law to compromise either the civil or the criminal liability where in the criminal case he is convinced that there has been no intentional violation. But I charge you, gentlemen, that that is a matter for the commissioner of internal revenue to decide and not for this court or this jury. I charge you that if the commissioner had compromised the civil liability he would have had the right to have held this criminal liability here, and that the compromise of the civil liabilty would not, unless the commissioner agreed to it, relieve the defendant in a criminal case. I charge you that those matters, in refusing to accept the compromise, whether the commissioner acted or not, and whether he ought to have acted or not, are not to be considered
123 by this jury. We have our functions and duties, and that is enough for us. He has his, and we are not to infringe upon his duties and responsibilities that the law imposes upon him. That will not affect your verdict, if you find that the defendant has done the acts complained of. The failure of the commissioner, if he failed and refused to compromise the case, is no reason why you should return a verdict otherwise than as your conscience dictates.

Now, gentlemen, something has been said here about the law—about two laws, in fact. I charge you, gentlemen, that you and I have nothing to do with what laws Congress shall make, except as any other citizens. When it comes before this court, and the law has been declared to be valid and constitutional, it is your duty and mine to enforce the law. It is hardly necessary to say that no other *other* rule would be safe for any man. If one set of men can pick out one set of laws which they don't like, another set of men can pick out another set of laws that they don't like, and we would soon have no laws, and no order. So I charge you, gentlemen of the jury, that it does not make any difference whether you or I think these laws are wise or not. They are there, and it is our duty to enforce them. I also charge you that we are not trying this defendant here for the violation of any prohibition laws. If you should gather from this evidence that the defendant has been engaged in the violation of the prohibition law, in this illegal business, that alone is no ground to convict him under this act. He is being charged here under the internal revenue law and the perjury statute. But I also charge you, gentlemen, in this matter of the violation of the prohibition law, evidence is before you simply from the peculiar facts of the case. The Government alleges that these profits were made by violating the prohibition law, and therefore if you find the facts of the case under the charge that I have given you and will give you, that the defendant has been guilty of the violation of the prohibition law, that alone should not convict him in this case. You would have to go further and find that by virtue of those violations of the prohibition laws, that he made this profit from the sale of beverages, either legal or illegal, as the Government claims, and failed to make his return as the Government charges in these various counts.

Now, gentlemen, something has been said about keeping books. I charge you, gentlemen, that the act of Congress itself so far as this particular charge is concerned, does not require a man to keep books; but it does require him to make a return, and if in order to make his return he ought to keep books, and he can't make a return without books, then it would be his duty to keep books, because it is his duty to make the return. If he can make his return honestly and sufficiently without the keeping of books, all well and good. But he must make that return, and he must make it fairly and honestly, under the law as I have given it to you, and if a person does not keep books and does not make any explanation of any deductions or losses claimed, and has no books, I charge you, gentlemen, that that is a circumstance that you have a right to take into consideration in considering whether the defendant in this case willfully evaded or refused to make proper returns as charged by the Government.

Now, gentlemen, a good deal has been said to-day about these bank balances. The question of the effect of these bank balances, gentlemen, is a question of fact for you, and what I am going to say to you is not binding upon you upon the facts. But I am going to give you my view of those bank balances, and bank deposits and checks, as to its effect as evidence before you, for your benefit and in order to assist you in trying to arrive at what is a correct and true conclusion in this case. From deposits in the bank and checks and balances, if they stood alone, it might be difficult for the jury to determine from them what a man's net income or gross income was at the end of any particular time. And so, gentlemen, I charge you, if that was all in the case, the jury might have some difficulty in arriving at whether or not this man had a net income in 1919, or in 1920, or a gross income or net income in 1921. But that is not all that there is in this case. There are other circumstances, and there is other evidence tending to show that this defendant did make a profit during those years. He says he did not, and I charge you that in considering this matter, you should take into consideration, not only the bank books, the deposits in the bank, the bank balances, and the checks, but all of the evidence in the case,

125 and when you have considered all of the evidence, see whether it points or not to the fact that this defendant in any one of those years charged, did have a net income which he should have returned. Of course, gentlemen, as I said, that is a question of fact for you. You are business men and know that a man may have a large running account at a bank and not make a profit. He also might have a large or a small balance at the end of the year and might have made a big profit, or might have made none at all. Those things are not conclusive, but you have a right to consider, if a man's deposits are large and the nature of his business he is in, coupled with the other evidence in the cause, as to whether it would persuade you that he must have made profits, and that he ought to have returned them.

I am going over this a little more in detail with you. Take the year 1919. In 1919, according to the evidence here, there was one bank only with which the defendant did business, and that was the Citizen's Bank. In that year the bank books show on his deposit account deposits of $70,932.53, and that he checked out for the same period $69,558.18, and that his balance at the end of the year was $1,374.35. Now, in the defendant's return, which he concedes here, and admits that he made, he puts down under the head of labor, $3,745.34; under the head of merchandise $37,123.70. Other costs, $212.94; making a total of his expenses, $41,081.93. The only deductions that he claims under that is $600.00 for rent, leaving $41,681.93, which deducted from the total sales that he puts down of $44,701.18 makes a net income of $3,019.25. You will observe there, gentlemen, that according to the bank books, the total deposits ran to over $70,000.00. He testified before you that the bank books were his method of keeping his books. His return only shows a total sales of $44,701.18. Now, you have a right to consider that difference in there, if there was a difference, what became of that money, what it was for, where it came from, whether it was profits or not; and you have a right also to consider the evidence that during that year there is evidence tending to show that the defendant was in the whiskey business. There is evidence that year of certain whiskey which he is alleged to have been interested in, what the prices were, what the profits were, what the sales were. So you have a right to consider all of that evidence together, and determine whether or not there was more than the $3,019.25 net income which he returned.

126 Now, I charge you that it is not incumbent upon the Government, under the perjury charge in the first count of the indictment, to prove the full amount of $5,000.00, if he made more than $3,019.25 net income for 1919, and if you find beyond a reasonable doubt that he did make more than that and that he failed, willfully and corruptly, intending to defect this tax, to put that in there, and then you would be justified in finding him guilty, although it did not reach the sum of $5,000.00, upon this count.

So also as to the year 1920, the evidence shows that in that year he had his total deposits in the Dime Savings Bank of $5,009.15, and in the Citizens Bank, $50,335.21, making his total deposits for that year of $55,344.36. His checks on the Dime Savings Bank were $4,509.83, and on the Citizens Bank, $50,374.57, making a total of checks in those two banks for 1920, $54,884.40—leaving a balance in the two banks then—one is an overdraft, I think—overdraft in one bank and a balance in the other—net balance, of $1,459.56.

There is evidence also before you, which you are also to consider, that during that year 1920, there was some evidence tending to show that the defendant was in the whiskey business, and was receiving other sums of money and it is for you to consider that volume of business, the fact of his being engaged in it—apparently engaged in it—and he admits himself that he had made some sales during

that year, as I recall it. If you find from all of that evidence for that year, if that evidence satisfies you beyond all reasonable doubt, taking the bank books and all the transactions, the volume of business, what was done—what you believe about it—that there must have been at least $2,000.00 net income over and above his exemptions, why then, it would have been his duty to have returned it, and if you find that he wilfully refused to make a return for that year, you would be warranted in finding him guilty under the second count of the indictment.

So likewise, in the year 1921, the evidence shows that the deposits in the Enterprise Bank for that year were $7,835.90, and in the Citizens Bank, $48,618.56, making a total of $76,454.46. His checks for the year on the Enterprise Bank were $7,122.28—on the Citizens Bank, $67,746.53—making a total of his checks for that year
127 of $74,919.41, leaving a net balance of $1,535.05. This is as the court recalls it, but you will have your own recollection of the evidence. There was evidence before you, which if you believe it, would tend to show that the defendant during the year 1921 was engaged in the liquor business and was receiving certain other sums that do not appear in his bank accounts apparently, and you have evidence there as to what the profits were in that business that year—hos much a case of whiskey cost in the Bahamas, what the freight was, and how much it could be sold for here. That evidence is all before you, and if from all of that evidence, the bank balance and all, you come to the conclusion, if you are satisfied beyond a reasonable doubt, that the defendant must have made more than $5,000.00 gross income, or must have made more than $2,000.00 net income, either one, and that he willfully refused to file a return for that year, with intent to defeat this tax, you will find him guilty upon the third count.

Now, then, gentlemen, I think it fair to the defendant, and to the Government, too, while upon these matters of evidence I have been trying to help you come to a conclusion upon the case (but you are to take your own views upon the evidence and facts), to charge you in reference to the boat "Florence." There has been a good deal said about the ownership of the boat. I charge you that it is common sense and you know it, that in determining whether or not this defendant got profits from the boat "Florence," it would not be necessary for the Government to show that the boat was registered in his name. It might have been registered in the name of some other person, as was the testimony of the captain here. The Government says that the circumstances of the transaction all point to the fact that this defendant was one of the owners, if not the sole owner, of the boat "Florence." Now, it is for you to say from the circumstances here, whether you think he was interested in it or not; whether he was the owner, and if interested in it, then it is for you to say, to determine, if you find that the "Florence" was making profits during the years that I have mentioned, you may consider that fact in determining whether this defendant—take it for what

you think it is worth, in determining whether the defendant got profits or not.

As to the boat "Swannanoa," the defendant admitted the
128 ownership of the "Swannanoa." As the court recalls it, there was some evidence before you of the use of the "Swannanoa" in that illegal business, and if you find such to be the fact, that the "Swannanoa" was used in the sale of beverages, and that from those sales this defendant made a profit, you would take that into consideration in determining whether he made an income which ought to have been returned in any of the years I have already charged you about.

Those are questions of fact for you, and I don't know that there is anything further that I can assist you upon. The case is peculiarly one of fact for the jury. If you find from the evidence before you that this defendant had a net income of more than $3,019.25 for the year 1919, and that he knowingly left that out of his statement which he made, wilfully, with intent to defeat and evade that tax, and that he swore to that return in which it was left out, and did that wilfully, then you would be justified in finding him guilty on the perjury charge and on the first count of the indictment, under the internal revenue act.

If you find beyond a reasonable doubt that in the year 1920, he had a net income of more than $2,000.00 and was therefore under the duty to make a return, and that knowingly and wilfully, he failed and refused to make that return for that year, then you would be warranted in finding him guilty under the second count of the indictment, under the internal revenue act.

So also as to the third count. If you find that during the year 1921 the defendant had a gross income of $5,000.00 or more, or had a net income of $2,000.00 or more, and was under a duty to make his return for that year, and it being his duty, and knowing that he had made this income, he wilfully refused and failed to make such return, and did that for the purpose of evading the tax, you would be justified in finding him guilty under the third count.

I think I have covered all of your requests, except the ones that I refused, Mr. District Attorney. (The district attorney states that he will withdraw all the other requests.) Are there any other charges, for either side? (No further charges.) Any exceptions? (None, from either side.)

Gentlemen, you will find a separate verdict here for these two indictments. On the perjury indictment here, if you find the
129 defendant guilty, you will say "We, the jury, find the defendant" (writing his name in pen and ink) "M. S. Sullivan, guilty." Date it, and sign your name as foreman. Or, if you find him not guilty, write "We, the jury, find the defendant, M. S. Sullivan, not guilty."

As to the three counts of the indictment, if you find him guilty on all three counts, you will say, "We, the jury, find the defendant guilty, date it, and sign your name as foreman. If you find him

guilty on one count, and not on the other counts, then you will designate which count you find him guilty on, and which not guilty, and if you find him not guilty on any count of this indictment you will simply say "We find the defendant not guilty." Date it and sign your name as foreman, in pen and ink.

After deliberation the jury returned and asked further instructions.

FOREMAN. One of the jurymen has requested information as to the payments on property and the years in which made.

COURT. I have some notes that—all that I have in my notes from Mr. Cogswell's testimony is that there was a deed, October 23, 1919, from Wilson Harvey to the Hampton Park property, consideration of $10,000 and other valuable consideration, and revenue stamps on that of $7.00. He also testified as to another deed of M. S. Sullivan to Crystal Svendsen Sullivan to the same lot, dated July 25, 1922, consideration of $10.00. That was a life estate to Crystal Sullivan, remainder to Albert M. Sullivan under certain conditions, subject to a mortgage so stated. Now, Mr. Cogswell in his further testimony said there was another deed, from Kohnke to Sullivan, July 1, 1920, consideration $10.00 and other valuable considerations, and revenue stamp att'ched of $8.50. That was a piece of property on Market Street, fee simple deed. Another deed he testified to was some real estate fee simple deed. Another deed he testified to was some real estate company to Sullivan, and was recorded April 18, 1921. The actual date of the deed was not given. Consideration $15,000.00. No. 125 Market Street. Now, the note and mortgage to Harvey, dated October
130 23, 1919, of $3,000.00, and of Crystal Sullivan to Ohlandt on that same property, 20 March, 1923, of $3,000.00, and of Crystal Sullivan to Belle Blank on 20 March, 1924, of $5,000.00. Then he testified also that there was a mortgage of M. S. Sullivan to Kohnke of $6,500.00 on the Market Street property, and that there was also, he testified, a mortgage of M. S. Sullivan to the South Carolina Loan and Trust Company on one of the Market Street properties, $10,000.00, dated April, 1921; and he also testified as to deed of F. K. Myers, to Crystal Sullivan, March 20, 1924, consideration of $8,100.00, of the Hampton Park Terrace property, which I believe Sullivan said was his home.

In considering the pertinency of this evidence, you would consider the different years. In other words, in arriving at what was done in 1919, the mortgage given later on would not affect his standing or what he was supposed to have made during that year, but each particular year would stand to itself, in ascertaining whether or not he had money or whether he owed money at that time to see what his balance was.

(Court recessed at 1.30 p. m. At 5.40 p. m., the court sent for the jury and asked if they had agreed on a verdict. The foreman stated that they had not agreed on one count, and that the difference was a question of fact, as he understood it.)

FOREMAN. I might state that it may involve the question of that income—it may involve the question of the deductions which are

allowed and as to the responsibility of the defendant to furnish the deductions, furnish the information.

COURT. I understand then that your difference may be one of law in reference to the question of ascertaining what, if any, deductions should be allowed as to any one of the particular years for which he was liable to make a return, if he found he was liable. Is that the idea?

FOREMAN. Yes, sir, a year in which no return was made.

COURT. I charge you this, gentlemen, that it is the duty, as I
131 have already charged you, of a man who has, for instance, in the year 1920—that is, under the second count in the indictment—if he had, during the year 1920, a net income of more than $2,000.00—$2,000.00 and upwards—being a married man—that it was his duty to file a return showing his gross income, his losses and expenses, if any, that he incurred during that year, and any deductions he might claim. That that was his duty, to file such a return. So in that year 1921, under the 1921 act, if he had a net income of $2,000.00 or if he had a gross income of $5,000.00, it was his duty to file a return showing his income, his losses and deductions, if any were claimed.

Now, I charge you that under this indictment the Government has the burden of proof beyond a reasonable doubt throughout; that the burden does not shift. But I charge you this, gentlemen, that if you find there was a gross income in any year, if you find that there was a gross income there and that there were profits made in that year, while there would be no presumption of law, and while the burden of proof would not be upon the defendant to show what his deductions were, nevertheless, in considering the case, if you find from the testimony that he had opportunity to show what his deductions were, and that he has not shown them—if you find that he did not show them to the officers when called upon, if you find that there was a gross income that warranted you in believing there was a net income of $2,000.00 or more, unless there was a deduction, and you have no evidence to show any deduction, I charge you that as a matter of common sense you would be entitled to infer from those facts that there was a net income. If you find the facts to warrant the belief that there was a net income of $2,000.00 or more, provided there are no deductions, you would be warranted in finding that there are no deductions when you have no evidence before you to that effect, if you find that there was a gross income which warranted profits. You have heard the testimony on that line.

In other words, gentlemen, while the defendant is under a duty, when he makes his return, to state what his deductions are in that return—when the Government attempts to prove its case for evasion of the tax under the statute or wilful failure to file a return—the
Government must show beyond a reasonable doubt that
132 there was a taxable income over the allowance for deductions.

But if you fail to find from the evidence before you, and there is evidence to the effect that the defendant had an opportunity

before the officers—before this case ever came up—to show what losses he had in his business, if any, and what deductions he claimed if any, and made no explanations of them, made no showing, and if you further find that from the evidence before you in this case, that there are no deductions shown, no losses and no explanations at all or anything that would warrant you in making a deduction, why then you would have the right to infer that there were no deductions, as a matter of fact, not as a matter of law; and you would be warranted in such case in finding—if you find there was a gross income from which you could infer that he made profits, and had profits above $2,000.00 and that no explanation was made of any deductions, and the defendant had the opportunity to make them, you would be warranted in inferring that there were none. In this particular case, the defendant admitted upon the stand, as I recall it (you will bear the evidence in mind), that he did not claim any deductions at all for any charitable contributions or deductions of that nature. His evidence, as I recall it, was that he said he had not made any money during those years. But, as I recall, he did not anywhere show you or make any statement of any particular loss or expense or deduction, if any, of the two years that are referred to. His theory was, as I recall his testimony, and his argument, that because at the end of the year his bank balance showed a small amount, less than the amount that he was entitled to claim because of his being a married man, $2,000.00, that therefore you would be warranted in assuming that he made no money during the year. I have already charged you that that conclusion does not necessarily follow—that the bank balance does not show at the end of the year whether there were profits, large or small, but is simply one of the points that you take into consideration, upon the whole case, his bank books in connection with the other evidence in the case, to ascertain whether he was really making profits during those years; and you have a right to consider whether it is likely or probable, or not, that a man
133 doing business of fifty and sixty and seventy thousands, whether he would make a profit or not, and in the kind of business he was, from the testimony you have before you, you have a right to consider whether or not it was likely that he made no profits at all. You have a right to take that into consideration.

Now, gentlemen, you are brought from the body of the district. It is possible that you never saw one another before. You come from all parts of the district, from a different environment. Your previous history may be different—your previous environment may be different; and it is natural that under such circumstances there should be differences of opinion among men who are brought together—twelve men from different parts of the country. Even if you came from the same town, it is natural for people to differ in their opinions. But the law requires that juries shall render a unanimous verdict. It is very desirable, therefore, if the jury system is to be continued in this country (and our people are

wedded to it—there is no suggestion or hint anywhere or from any body of the abolition of jury trials)—it is very important, therefore, if that system is to be made efficient that juries should, if possible, agree. Owing to the fact that it is human for us to differ with one another, it is all the more desirable therefore that jurors make an earnest and a fair effort to reach agreement in a case. It is the duty of a juror to himself and to his fellow jurors and to his oath of office, to listen patiently to the argument of his fellow jurors, to present his own arguments calmly and dispassionately, without pride of opinion, as far as it is humanly possible for people to lay aside pride of opinion, because the matter is an indifferent one to you, except to reach a correct conclusion. Some people have an idea that it is a weakness to change one's opinion. On the other hand, it is evidence of strength of character, rather than of weakness, if you are convinced that you are wrong, and that your fellow jurors are right, to yield to their opinion and change. It is rather an evidence of strength of character than weakness. So I am going to ask you, in view of the importance of the case, to consider this matter again. I want to say, however, that after a juror has listened fully and patiently, gone over the evidence, if he has a conscientious
134 abiding conviction, he is not bound to surrender his conscientious abiding conviction. But he should make an effort to try to reach a verdict, if it can be done consistently, conscientiously, and in view of your oath and duty.

This case has taken quite a while, gentlemen, and I don't want to impose any hardships upon you, but I do wish to say that it is my purpose that this jury shall consider this case fully, and I feel sure that you will cheerfully acquiesce in it. It is not from any desire to impose any hardship upon you in the case, but because of the fact that mistrials are one of the greatest hindrances to the administration of justice. I am not going to keep you up in a jury room all night; but I do think that this is a case that ought, in the interests of *of* the defendant himself and of the Government, to be ended, if it can possibly be done. So I am going to instruct the marshal to give you your supper and the clerk will give you an envelope. If before eleven o'clock, you agree upon a verdict, then you will write it out and sign it, as I have directed you, Mr. Foreman; put it in the envelope, seal the envelope up and put the envelope in your pocket. You will then notify the marshal/ that you have agreed upon a verdict, and the marshal will then release you, and you may report your verdict in court tomorrow morning at ten o'clock; with the injunction to you, however, that no member of the jury should disclose what his verdict is until this report is made in open court that is, if you agree before eleven o'clock. If you do not agree before eleven o'clock, I don't propose that you shall be kept out of your night's rest. I have instructed the marshal to prepare comfortable quarters for you at a hotel here, where you will get a good night's rest, and tomorrow morning you may resume your deliberations.

FOREMAN. It is question of law, on the ruling of the department o profits from illicit business. It is whether the expenses are con sidered or not as a deduction. As I understood matters there was difference of opinion on that matter, and it is not quite plain as t the judge's instructions.

COURT. I charge you, gentlemen, as I think I charged you before that when a man is engaged in an illicit business, that that o
135 course does not relieve him of the duty of paying his income tax upon the income from the illicit business, and that he i equally under the duty to file a proper return in cases in which I have already charged you in reference to the amount. That does not excuse him. I charge you though, gentlemen, that while there is something in the regulations of the commissioner which would indicate that losses and expenses in an illegitimate business would not be deducted. I charge you that the law does not say so, and that a I view the law, the Commissioner of Internal Revenue had no powe to make that regulation beyond what the law says. I think, and I s charge you, that a man, even in an illicit business, if he made, say $10,000.00, in bootlegging, and in that illicit business it cost him $2,000.00 or $3,000.00 of expenses, he would be entitled to deduct that in order to ascertain what his net income was, which would make it $8,000.00 or $7,000.00, as the case may be, under the illustration that I have given you. But, as I have already charged you, the jury ought to have some tangible evidence before them as to what these deductions are. As I recall it, there is no evidence before you that in this illicit business there were any expenses at all except the expenses that the Government's witnesses testified to, that there were certain freight charges. That is all that I recall; and as I have already charged you, while the Government must make out its case upon the whole case beyond a reasonable doubt, it is a fair inference that if a man has full opportunity to show losses and expenses, and does not do so, the jury may infer from that, that there were none.

Does that cover the points that you desire?

FOREMAN. As near as is possible, I suppose, your honor.

(Before the court gave the foregoing instruction as to rendering a sealed verdict the court had asked the district attorney and the defendant (but not in the presence of the jury) if there was any objection to a sealed verdict, and each replied that there was no objection.)

Verdict

And thereafter the jury returned a verdict of not guilty on
136 the perjury indictment and a verdict of not guilty on the first two counts of the evasion of income-tax indictment and a verdict of guilty on the third count of the income-tax indictment involving the year 1921.

A motion for a new trial was made and refused. Thereupon the efendant, Manly S. Sullivan, was duly sentenced in accordance with he law.

Sentence

Whereupon it is considered, ordered, and adjudged by the court hat the said defendant, Manly S. Sullivan, be imprisoned in the ommon jail of Richland County for the term of six months.

In open court, this the 25th day of January, 1926.

ERNEST F. COCHRAN,
U. S. Judge.

Agreement re transcript

It is agreed between counsel that the exhibits need not be printed n the Transcript of Record, it being conceded by all that there was locumentary evidence to support the testimony as set out in the ase, and there is no question that the bank accounts existed and were unning as shown by the testimony.

And now, in furtherance of justice and that right may be done, the efendant, Manly S. Sullivan, presents this his bill of exceptions in he cause and prays that the same be certified by the judge as pro- ided by law.

FREDERICK W. ALEY,
Attorney for Plaintiff in Error.

The foregoing bill of exceptions is acceptable to me.

J. D. E. MEYER,
United States Attorney.

Order settling bill of exceptions

Signed, sealed, and settled this 12th day of March, 1926.

ERNEST F. COCHRAN, [SEAL.]
United States Judge,
Eastern District of South Carolina.

7 In United States District Court

Assignments of error

Filed Jan. 25, 1926

Now comes the defendant, complainant and files the following ssignments of error upon which he will rely upon his prosecution f the writ of error in the above entitled cause:

FIRST

The presiding judge erred in admitting the following testimony of A. R. Goodwyn, head of the income tax department, in the office of the collector of internal revenue, at Columbia, S. C., upon the ground that the same was irrelevant and incompetent, did not tend to prove the offense charged against the defendant, and was prejudicial:

"Direct examination by Mr. Meyer (U. S. District Attorney):

Q. Did Mr. Sullivan pay anything more than $32.82?

A. That is all he paid.

Objection, Mr. Sullivan, to the testimony, "The district attorney says I made $5,000.00 on beverages, but he has produced no evidence to show that I made $5,000.00 on beverages."

COURT. He will have to show that. I will admit the evidence for the present. If he doesn't connect it up, it will not be worth anything.

SECOND

The presiding judge erred in admitting the following testimony of Pierre Stoney, employed in 1921 as assistant cashier of the Enterprise Bank of Charleston, S. C., a witness for the Government, upon the ground that the same was irrelevant and incompetent, did not tend to prove the offense charged against the defendant, and was prejudicial.

138 "Direct examination by Mr. Meyer (U. S. District Attorney):

"Account of M. S. Sullivan, Enterprise Bank, June 7, 1921, to Feb. 1st, 1921.

Offered in evidence.

Objection, Mr. Sullivan, on the ground that the evidence was taken from a defunct bank, in which the president and directors were prosecuted, and some plead guilty.

Overrul/ed. Account admitted."

THIRD

The presiding judge erred in refusing to allow E. D. Buckley, deputy collector, internal revenue office, a witness for the Government, to answer the following question asked on direct examination by the defendant Sullivan, on the ground that the defendant was entitled to have said question answered and the same would have been relevant and competent:

"Q. Did or did not Mr. Huffington come to you and make overtures to you to hold up the returns in my case?

A. I refuse to answer that question.

Court sustains witness, and excludes question. "We cannot go into Mr. Huffington's conduct, he is not on the stand, and the Government is not relying on him."

FOURTH

The presiding judge erred in refusing the motion of defendant, duly and properly made, to direct a verdict in favor of defendant on the ground that on the whole evidence the Government had failed to make out its case against defendant.

M. S. SULLIVAN.

139 In United States District Court

Stipulation re transcript of record

Filed Jan. 25, 1926

[Title omitted.]

It is hereby stipulated and agreed that the clerk of this court shall make up a transcript of the record in the above styled case and transmit the same to the clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia; and that it be printed under the supervision of the clerk of that court, in accordance with Rule 23.

M. S. SULLIVAN,
FREDERICK W. ALEY,
Counsel for Plaintiff in Error.
J. D. E. MEYER,
Counsel for Defendant in Error.

January 25, 1926.

In United States District Court

Memorandum re certain papers

Petition for writ of error filed January 25, 1926.
Order allowing same filed January 25, 1926.
Writ of error issued and filed January 25, 1926.
Copy lodged for adverse party.
Bail bond pending writ of error filed January 25, 1926.
(Penalty $5,000.00. Surety Albert Sottile. Charleston, S. C.)
No bond for costs.
140 Citation issued and filed January 25, 1926.
Service acknowledged same day.
Order enlarging time for certifying up transcript filed March 8, 1926.

[Clerk's certificate to foregoing transcript omitted in printing.]

141 In the United States Circuit Court of Appeals for the Fourth Circuit

No. 2507

Manly S. Sullivan, Plaintiff in Error, versus The United States of America, Defendant in Error

Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston

Minute entries

April 3, 1926, the transcript of record is filed and the cause docketed.

Same day, the original petition for writ of error, order allowing writ of error, writ of error, bail bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Frederick W. Alex is entered for the plaintiff in error.

In United Sates Circuit Court of Appeals

Order extending time

Filed April 3, 1926

142 It appearing to the court that it is impracticable for the clerk of this court to prepare and certify up the transcript of record on writ of error in the above-styled case by the date limited in the citation, it is, upon consideration thereof:

Ordered, That the time within which the said transcript may be prepared and certified up to the appeal court be and the same is hereby extended thirty days from this date.

March 8th, 1926.

ERNEST F. COCHRAN,
United States District Judge.

April 7, 1926, the appearance of J. D. E. Meyer, U. S. Attorney, is entered for the defendant in error.

April 29, 1926, twenty-five copies of the printed record are filed.

In United States Circuit Court of Appeals

Argument and submission

June 9, 1926 (June term, 1926), cause came on to be heard before Rose and Parker, circuit judges, and Soper, district judge, and is argued by counsel and submitted.

143 In United States Circuit Court of Appeals, Fourth Circuit

[Title omitted.]

Argued June 9, 1926. Decided October 19, 1926.

Before Rose and Parker, circuit judges, and Soper, district judge.

Frederick W. Aley for plaintiff in error, and J. D. E. Meyer, U. S. Attorney (Louis M. Shimel, Assistant U. S. Attorney, on brief), for defendant in error.

Opinion

Filed October 19, 1926

SOPER, District Judge:

The plaintiff in error, who was defendant below, was convicted in the District Court of the Eastern District of South Caro-
144 lina under the third count of an indictment which charged a violation of section 253 of the revenue act of 1921 (42 Stat. 227, 268), in that during the year 1921 he had a net income in the total sum of $10,000 from an automobile agency and from the business of selling beverages, and that he wilfully refused on March 15, 1922, to make a return to the collector of internal revenue for the internal revenue collection district of South Carolina, stating specifically the items of his gross income and the deductions and credits allowed under the act. There is but one assignment of error, which grows out of the refusal of the district judge to direct a verdict of acquittal.

Section 253 provides that any person who wilfully refuses to make such return shall be guilty of a misdemeanor and fined not more than $10,000 or imprisoned for not more than one year, or both. Section 223 (42 Stat. 250) provides that certain individuals, such as the defendant, shall make, under oath, a return stating specifically the items of their gross incomes and the deductions and credits allowed under the law. No return was made by the defendant, although the evidence shows clearly enough that during the year 1921 he was in receipt of a net income of at least $10,000 from the sale of intoxicating liquors in violation of the national prohibition act. But the defendant contends (1) that unlawful gains are not within the meaning of the revenue act of 1921 and (2) that, in any event, he was relieved from the duty of making a return by the provision of the fifth amendment to the Constitution that no person shall be compelled in any criminal case to be a witness against himself.

It is admitted that Congress has power to tax incomes derived from the unlawful sale of intoxicating liquor, United States vs. Yuginovich, 256 U. S. 450, 462; United States vs. Stafoff, 260 U. S. 477, 480; and that such income comes literally within the words em-
ployed in section 213 of the act (42 Stat. 237), which provides
145 that "the term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal services * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from

interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

But the argument is that Congress could not have intended to include within these terms the gains from crime, and thus put legitimate and illegitimate transactions on the same footing. It is pointed out that strong reasons of public policy require that the gains of commercial dealings, which are also criminal, should be regarded as beneath the contempt of the law for purposes of taxation. The inconsistency of the Government in prohibiting an act, and at the same time subjecting it to taxation for purposes of revenue is obvious. The difficulty, if not the impropriety, of applying certain administrative sections of the revenue act to an illegal business is also manifest. The tax payer is not only to make a return, stating the items of his income under section 223 as pointed out above, but is required by section 1300 (42 Stat. 308) to keep such records and render under oath such statements and returns, and to comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary, may from time to time prescribe. The criminal would be compelled to keep a business record of his crime. Section 214 of the act (42 Stat. 239) provides for the deductions allowable in computing the net income of the tax payer, and specifies that they shall include all the ordinary and necessary expenses paid or incurred in carrying on the business; and thus the law would seem to impose upon the Government, in order to ascertain
146 the net income of an illicit trade, the duty to examine, if not to allow such expenses as the bribery of officials and others equally obnoxious. Furthermore section 1311 (42 Stat. 311) reenacts amongst others, section 3167 of the Revised Statutes which makes it unlawful (with certain exceptions discussed below) for any collector or officer or employee of the United States to divulge or make known to any person, the amount or source of income set forth or disclosed in any income return, or to permit any return or copy thereof to be seen or examined by any person, and any offense against this provision is a misdemeanor, punishable by fine or imprisonment; and it is suggested that Congress could not have intended to impose upon the agents and employees of the United States, under any circumstances, the obligation to keep secret information of the commission of crime which should come to them in their official capacity.

These considerations, it must be confessed, are persuasive in their force, and it is not surprising that they have led to divergent opinions in the courts which have passed upon the question. The Circuit Court of Appeals of the Second Circuit, in the case of Steinberg v. United States, decided June 1, 1926, has held that the profits from the sale of intoxicating liquor, in violation of the national prohibition act, are income within the meaning of the revenue act of 1921; but there was a vigorous dissent. Again the Supreme Court

of Canada, in the case of the Canadian Minister of Finance v. Smith, 2 D. L. Rep. (1925), 1137, in which precisely the same question was raised, decided that profits from illicit traffic in liquor, forbidden by the laws of the Province of Ontario, were not taxable under the Canadian income war tax act of 1917; but this decision was recently reversed, in the summer of 1926, by a judgment of the judicial committee of the privy council which declared that it was not only within the power of the Dominion Parliament, but within its intention, to apply the provisions of the law to the profits in question.

147 The weight of authority is therefore against the first contention of the defendant in the case at bar. Moreover, it cannot be said that the dictates of morality or of propriety are all one way. It does not satisfy one's sense of justice to tax persons in legitimate enterprises, and allow those who thrive by violation of the law to escape. It does not seem likely that Congress intended to allow an individual to set up his own wrong in order to avoid taxation, and thereby increase the burdens of others lawfully employed. The problem which Congress had to consider was not so simple as that presented by the case of one whose entire income is earned in a business which offends against a national law of uniform application. Activities lawful in one State of the Union may be unlawful in another. The operations of individual men in the prosecution of their business enterprises are sometimes within and sometimes without the pale of the law. Great aggregations of capital, which have a place in the popular mind, far above the sordid level of the illicit distiller, and the common criminal, sometimes find it profitable to ignore the laws of the State or of the Nation. The complexities of the situation are without number. Can it be said that in all such cases Congress intended to tax the law abiding, and let the criminal go free?

The history of national income-tax legislation throws some light on the question. The first income tax law, after the adoption of the sixteenth amendment to the Federal Constitution, was the revenue act of October 3, 1913 (38 Stat. 166). Section B (page 167), provided amongst other things that the net income of a taxable person should include income from "the prosecution of any lawful business carried on for gain or profit, or gains or profits, and income derived from any source whatever." The language is somewhat confusing, but it is significant that the word "lawful" has been omitted from the corresponding sections of subsequent revenue acts, including section 213 of the revenue act of 1921.

148 Furthermore the recent congressional legislation in regard to intoxicating liquors, outlined in the cases of United States vs. Yuginovich and United States vs. Stafoff, supra, shows that Congress has deliberately taxed what it has also prohibited. In the first case, the Supreme Court decided that section 35, title 2, of the national prohibition law, as respects persons manufacturing spirits for beverage purposes, superseded section 3257 of the Revised Stat-

utes which makes it an offense for a distiller to defraud the United States of a tax on spirits distilled by him, whereupon, as shown by the latter case, Congress passed the supplementary act of November 23, 1921 (42 Stat. 223), by which section 3257 and other revenue laws applicable to intoxicating liquors were revived. The supplementary prohibition act and the revenue act of 1921 were passed by the same Congress and approved by the President on the same day. Consequently we think that the income from crime is taxable, and find ourselves in accord with the majority opinion in Steinberg vs. United States, supra, where it is said:

"That a given sinner or criminal must in the pursuit of his or her prohibited vocation break many laws to obtain the wherewithal to satisfy the taxing law, must be regarded as immaterial, for the whole matter is covered by one remark of Holmes, J., in United States vs. Stafoff, 260 U. S. 477: 'Of course Congress may tax what it also forbids.' This is compendious enough, and was said about liquor; and equally is it, of course, that if the Legislature can tax the liquor which it forbids, it can also tax the gains made by dealing in that which is forbidden. We are not concerned with how these singular results are to be obtained; for it is further, of course, that he who makes unlawful gains can not lawfully be required to divulge how he made them. This difficulty is so obvious that it must have been considered even by the lawmakers."

Nevertheless, we are of the opinion that the judgment of the lower curt must be reversed on the ground that section 223, so far as it requires a return from one whose income is derived from a violation of the criminal law is in conflict with the fifth amendment. It has been seen that section 223 requires a return under oath showing specifically the items of income. Section 1308 (42 Stat. 309), authorizes the Commissioner of Internal Revenue, with the approval of the Secretary, to make all needful rules and regulations for the enforcement of the act, and articles 401 and 402 of Regulation 62 (1922 edition), require that the return of a person with a gross income for the year of $5,000 shall be on form 1040, which directs the taxpayer to give the total receipts from his business or profession, and to state the kind of business. Obviously, therefore, the act requires one who has violated the national prohibition law to file a return under oath, giving the details of his illegal transactions; and thereby, in our opinion, compels him to be a witness against himself in a criminal case, within the meaning of the amendment. This language has received a liberal construction by the courts, so that it may be said to be substantially equivalent to the ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make disclosures, or to give evidence which will tend to incriminate him or subject him to fines, penalties, or forfeitures. Counselman vs. Hitchcock, 142 U. S. 547-563; Brown vs. Walker, 161 U. S. 596. "The privilege," says the Supreme Court in McCarthy vs. Arndstein, 266 U. S. 40, "is not

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ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is the party defendant." So it was held that a bankrupt testifying as a witness under section 21a of the bankruptcy act was entitled to decline to answer certain questions concerning his assets and liabilities on the ground that to do so might incriminate him. Arndstein vs. McCarthy, 254 U. S. 71.

150 There can be no question that one who files a return under oath is a witness within the meaning of the amendment. The Supreme Court has held in Boyd vs. United States, 116 U. S. 616, that a defendant or claimant in a proceeding by the United States to establish a forfeiture of goods for fraud upon the customs revenues, can not be required by a court of the United States to produce his private papers and invoices for use in evidence against him. For the rule as to the books of corporations, see Wilson vs. United States, 221 U. S. 361. It is far more clear that the written statements under oath in the return of the taxpayer in answer to questions propounded on forms issued by the Commissioner of Internal Revenue, are the testimony of a witness, and amount to self incrimination if they disclose the commission of a crime.

A somewhat similar situation was considered in the case of United States vs. Lombardo, 228 Fed. 980. The act of June 25, 1910 (36 Stat. 826), was passed to prevent the transportation in foreign commerce of alien women for immoral purposes. It authorized the Commissioner General of Immigration to exercise supervision over them, and required, upon pain of fine or imprisonment, that every person harboring such a woman within three years after she had entered the United States, should file with the Commissioner General a statement in writing, setting forth the name of the woman and other facts. The defendant Lombardo was charged with violation of the act and the defense was that the act required her to incriminate herself under the criminal laws of the State of Washington, and thereby deprived her of the protection of the fourth and fifth amendments. The district court held that the defense was well founded.

The income-tax law of the Territory of Hawaii was before the Circuit Court of Appeals for the Ninth Circuit in the case of Peacock vs. Pratt, 121 Fed. 772. The law required all persons of lawful age, having an income of $600 or more for the preceding

151 year, from all sources, to render a return in July of each year of the amount of their incomes. An injunction to enjoin the enforcement of the law was sought on the ground that it violated the Constitution of the United States for the reason, amongst others, that it compelled taxpayers to furnish evidence against themselves which might result in their criminal prosecution. The court said that if the act was unconstitutional in the respect referred to, it did not follow that the whole law was thereby invalidated, for a tax-

payer might invoke the protection of the amendment whenever he should be called upon to submit to self incrimination.

Doubtless Congress could have brought such persons as the defendant within the provisions of the act requiring a return, if it had been of the opinion that a full disclosure was of greater importance than the possibility of punishment for crime; for Congress could have conferred the power of unrestricted examination by providing complete immunity. McCarthy vs. Arndstein, 254 U. S. 71. But complete immunity was not granted by the revenue act of 1921. The nearest approach is found in section 1311 (R. S. 3167), which provides that it shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations or the amount or source of income set forth in any income return, or to permit such return to be seen or examined by any person except as provided by law. The exceptions are important. Section 257 of the act (42 Stat. 270) declares that returns upon which the tax had been determined by the Commissioner of Internal Revenue shall constitute public records; but they shall be open to inspection only upon order of the President, and under rules and regulations prescribed by the Secretary, and approved by the President. Article 1090 of Regulation 62 shows that the President, by an Executive order dated January 24, 1922, directed that returns should be
152 subject to inspection in the discretion of the commissioner by officers and employees of the Treasury Department, by the solicitor of internal revenue, or by the head or some other officer or employee of an executive department or other Government establishment; and it was provided that a person, if permitted to inspect the returns, might make and take a copy thereof or a memorandum of data contained therein. (For a history of the publicity of income tax returns, see United States vs. Dickey, 268 U. S. 378).

The protection of secrecy, conferred by R. S. section 3167, therefore falls far short of that afforded by the fifth amendment. An instance of adequate protection is found in section 30 of the national prohibition act (41 Stat. 3317), which provides in substance that no person shall be excused on the ground that it might tend to incriminate him from testifying in any suit or proceeding based upon any alleged violation of the act, "but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, as to which, in obedience to a subpoena and under oath, he may so testify." It was decided that this statute satisfies the constitutional guaranty against self incrimination, and that a witness under it can not be excused from testifying on a claim of privilege. United States vs. 155 Cases of Intoxicating Liquor, 297 Fed. 411. A similar decision in regard to the immunity clause in the interstate commerce act of February 11, 1893 (27 Stat. 443), was rendered in Brown vs. Walker, 161 U. S. 593.

On the other hand, it was held in Counselman vs. Hitchcock, 142 U. S. 547, that R. S. section 860, providing that no evidence obtained

from a witness by means of a judicial proceeding, shall be used against him in any manner in any court of the United States in any criminal proceeding, did not afford the complete protection to the witness which the amendment was intended to guarantee, because it would not prevent the use of his testimony to search out
153–4 other testimony to be used against him in a criminal proceeding. Similarly the immunity clause of section 7 of the bankruptcy act, to the effect that no testimony given by a bankrupt at a meeting of creditors, shall be offered in evidence against him in any criminal proceeding, was held not to afford a protection equivalent to that guaranteed by the amendment. Arndstein vs. McCarthy, 254 U. S. 71; see also Heike vs. U. S., 227 U. S. 131. In short, the rule is as stated in Counselman vs. Hitchcock, supra, that "no statute which leaves a party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States." Judged by this standard, the revenue act of 1921 did not furnish adequate protection against self incrimination, and the defendant is entitled to invoke the privilege of the amendment in response to the indictment in the case at bar.

Summarizing our conclusions, we hold that (1) Congress has power, and by the revenue act of 1921 manifested an intention to impose an income tax upon the gains of criminal transactions; (2) the revenue act of 1921 does not furnish to one who makes incriminating disclosures in his income tax return an immunity from prosecution equivalent to the protection afforded by the fifth amendment; (3) the privilege against self incrimination provided by the fifth amendment furnishes a complete defense to an indictment charging a natural person, under section 253 of the revenue act of 1921, with failure to file a return of income under section 223, when the return, if filed, would disclose that the income was earned by the defendant in the course of the commission of a crime.

The judgment of the lower court is therefore

Reversed.

155 In United States Circuit Court of Appeals, Fourth Circuit

[Title omitted.]

Judgment

Filed and entered October 25, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court, in this cause, be, and the same is hereby, reversed; and that this case be, and the same is hereby, remanded to the District Court of the United States

for the Eastern District of South Carolina, at Charleston, with directions to set aside the verdict and grant a new trial in
156 accordance with the opinion of this court.

JOHN C. ROSE,
U. S. Circuit Judge.

October 25, 1926.

November 17, 1926, petition of defendant in error for a stay of the mandate is filed.

In United States Circuit Court of Appeals

Order staying mandate

Filed November 17, 1926

Upon the application of the defendant in error, by J. D. E. Meyer, Esq., U. S. attorney, and for good cause shown,

It is ordered that the mandate of this court in the above case be, and the same is hereby, stayed pending the application of the defendant in error in the Supreme Court of the United States for a writ of certiorari to this court, provided said application is filed in the said Supreme Court within 60 days from this date.

EDMUND WADDILL, JR.,
Senior Circuit Judge.

November 17, 1926.

157 [Clerk's certificate to foregoing transcript omitted in printing.]

158 In Supreme Court of the United States

Order allowing certiorari

Filed March 7, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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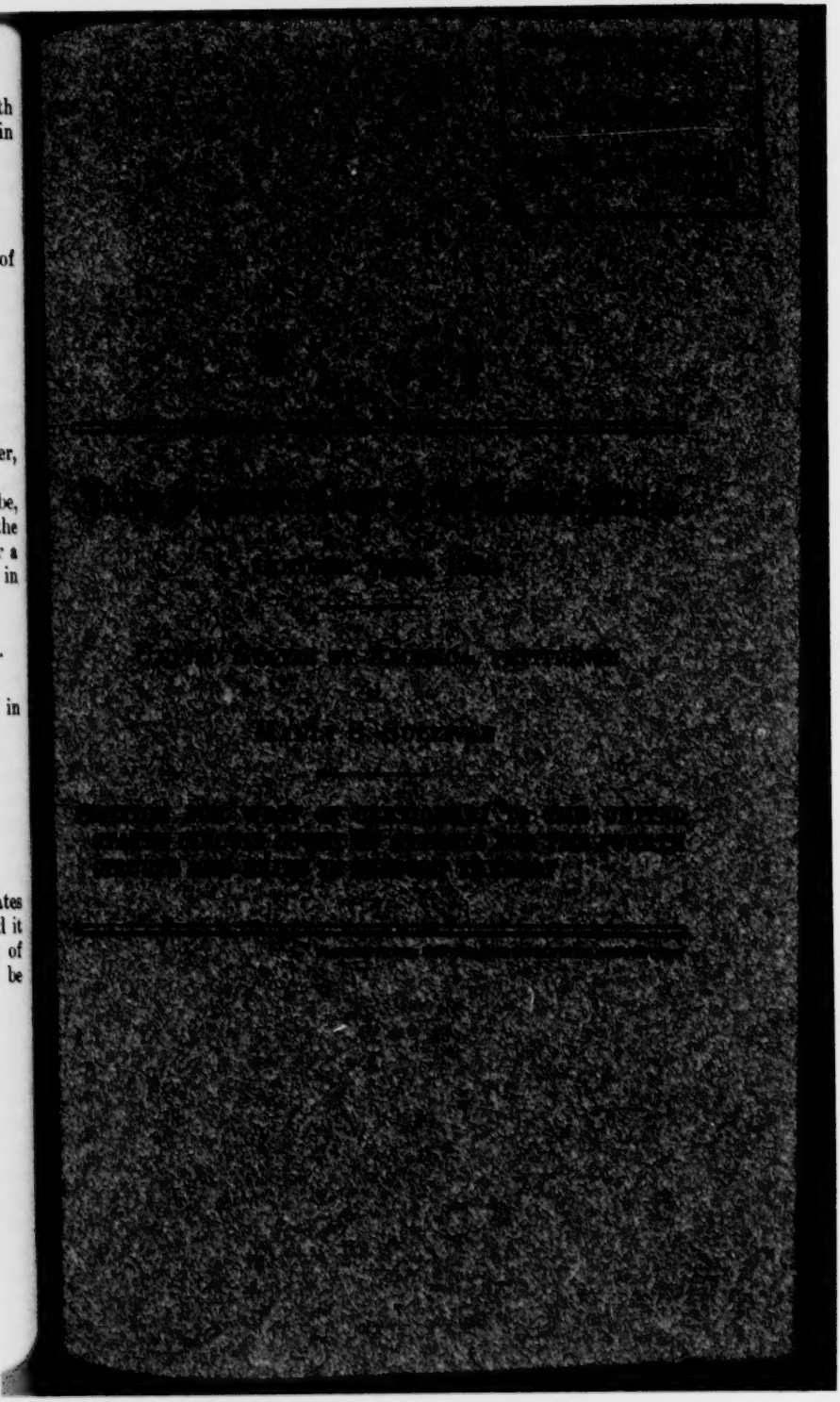

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AUTHORITIES CITED

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OCTOBER TERM, 1926

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

MANLY S. SULLIVAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above case on October 25, 1926 (R. 149), reversing the judgment of the United States District Court for the Eastern District of South Carolina (R. 136).

QUESTIONS PRESENTED

The first question is whether the Revenue Act of 1921 discloses an intention on the part of Congress to impose income taxes on gains derived from criminal operations.

Resolving that question in the affirmative, it then remains to determine whether the requirement

that a taxpayer, all or part of whose income is derived from criminal operations, must make an income-tax return, violates the provisions of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The pertinent language of the Fifth Amendment is—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 223 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 250) provides as follows:

> That the following individuals shall each *make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title*—
>
> (1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;
>
> (2) Every individual having a net income for the taxable year of $2,000 or over, if married and living with husband or wife; and
>
> (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income. (Italics ours.)

Section 212(a) provides (p. 237):

> That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> * * * * *

Section 213 provides (p. 237):

> That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived * * * from professions, vocations, trades, business, commerce, or sales, or dealings in property * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Section 214 provides (p. 239):

> (a) That in computing net income there shall be allowed as deductions:
>
> (1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;
>
> * * * * *
>
> (7) Debts ascertained to be worthless and charged off within the taxable year * * *.

Section 1300 provides (p. 308):

> * * * every person liable to any tax imposed by this Act * * * shall keep

such records and *render, under oath, such* statements and *returns,* and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe. (Italics ours.)

Section 1307 provides (p. 310):

That whenever in the judgment of the *Commissioner* necessary he *may require any person,* by notice served upon him, *to make a return* or such statements as he deems sufficient to show whether or not such person is liable to tax. (Italics ours.)

Section 1308 provides (p. 310):

That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, * * * to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return * * *.

Section 257 provides (p. 270):

That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President * * *.

Section 1311 amends Section 3167 of the Revised Statutes to read as follows (p. 311):

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer

or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person * * * the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof * * * to be seen or examined by any person except as provided by law; * * * and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both * * *.

Section 253 provides (p. 268):

That any individual * * * required * * * to make a return or to supply information, who fails to * * * make such return, or to supply such information at the time or times required * * * shall be liable to a penalty of not more than $1,000. Any individual * * * who willfully refuses to * * * make such return, or to supply such information at the time or times required * * * or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 1303 provides (p. 309):

That the Commissioner, with the approval of the Secretary, is hereby authorized to

> make all needful rules and regulations for the enforcement of the provisions of this Act.

Pursuant to this authority, Treasury Regulations No. 62 were promulgated. Articles 401 and 402 thereof require that the return of an individual with a gross income of more than $5,000, within which class it is claimed respondent in this case falls, shall be on Form 1040. Article 407 of Regulations 62 further provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form.

STATEMENT

Two indictments were returned against respondent in the Eastern District of South Carolina. One indictment charged perjury in connection with an income tax return for the year 1919, in violation of Section 125 of the Penal Code. (R. 6.) The other indictment, filed March 6, 1923, was in three counts, and charged evasion of income taxes, in violation of Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921, *supra*. The first count charged respondent with filing a false and fraudulent income tax return for the year 1919, while the second and third counts (the latter being the only count with which we are here concerned) charged wilful refusal to file returns for the years 1920 and 1921, respectively, alleging that in each of said years he had received profits of $10,000 from his automobile agency and his business of selling beverages. (R. 1–5.) The two indictments were consolidated, and the case was tried at the January, 1926, term of the District Court, at Charleston, South Carolina. (R. 6.) Prior thereto respondent had been tried and acquitted of conspiracy to violate the National Prohibition Act and had pleaded guilty and paid a fine for the transportation and possession of liquor in violation of the National Prohibition Act. (R. 73.) In the instant case respondent appeared without counsel (R. 6), entered a plea of not guilty as to both in-

dictments (R. 5) and conducted his own case. (R. 6.)

When interviewed in 1922 by revenue agents with respect to his income tax liability respondent refused to give any information as to the source of his income, on the ground that to do so would incriminate him (R. 15, 16, 17, 23, 35), but no claim of privilege respecting his failure to file a return was made or suggested until he reached the Circuit Court of Appeals in this case. At the trial he voluntarily took the stand in his own behalf and testified freely that during the years covered by the indictments he was engaged in the unlawful sale of liquor and defended on the ground that instead of conducting said business at a profit it had been conducted at a loss. (R. 71–100.) A part of his gross income was derived from lawful transactions, but the amount does not appear, so it was not shown that he had sufficient ($5,000.00) gross income from lawful sources to require a return as to that. The jury returned a verdict of not guilty on the perjury indictment, a verdict of not guilty on the first and second counts of the income tax evasion indictment, and a verdict of guilty on the third count of the latter indictment which charged willful refusal to file a return for 1921. (R. 135–136.) A motion for a new trial was made and refused; whereupon, on January 25, 1926, a sentence of six months in jail was duly imposed. (R. 136.)

On the same date, respondent sued out a writ of error from the Circuit Court of Appeals for the

Fourth Circuit. (R. 139.) Four errors were assigned. Assignments 1, 2, and 3 were as to the admissibility of certain evidence, and the fourth assignment was on the refusal of the judge to direct a verdict of acquittal " on the ground that on the whole evidence the Government had failed to make out its case against defendant." (R. 137–138.) In his brief and upon argument before the Circuit Court of Appeals respondent waived the first three assignments of error, and thereupon set up for the first time the contention that there should have been a directed verdict because (1) unlawful gains were not income within the meaning of the Revenue Act of 1921 and (2) that, in any event, he was relieved from the duty of making a return by the provision of the Fifth Amendment to the Constitution that no person " shall be compelled in any criminal case to be a witness against himself."

The decision of the Circuit Court of Appeals (R. 142–148) reversing the judgment of conviction of the District Court is on the theory that, although Congress has the power and by the Revenue Act of 1921 manifested an intention to tax the gains of criminal transactions, said Act (1) does not furnish to one who makes incriminating disclosures in his income tax return an immunity from prosecution equivalent to the protection afforded by the Fifth Amendment, because, under *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Brown* v. *Walker*, 161 U. S. 591, the protection of secrecy conferred by Section 3167 of the Revised Statutes, as

amended by Section 1311 of the Revenue Act of 1921, falls short of that secured by the Fifth Amendment; and (2) that the privilege against self-incrimination furnishes a complete defense to an indictment charging any natural person under Section 253 of the Revenue Act of 1921 with failure to file a return of income as required by Section 223 of said Act when the return, if filed, would disclose that income was earned in the course of the commission of a crime, because, under *Boyd* v. *United States*, 116 U. S. 616, and *Arndstein* v. *McCarthy*, 254 U. S. 71, the written statements under oath in the return of the taxpayer in answer to questions propounded therein must be held to be the testimony of a witness, and amount to self-incrimination if they disclose the commission of a crime.

SPECIFICATION OF ERROR TO BE URGED

The error which petitioner urges as ground for the granting of the writ of certiorari and for the reversal of the judgment of the Circuit Court of Appeals for the Fourth Circuit is:

The court erred in reversing the judgment of the District Court and holding that Section 223 of the Revenue Act of 1921, *supra*, so far as it requires the filing of a tax return by one whose income is derived from the commission of a crime is in conflict with the self-incrimination clause of the Fifth Amendment to the Constitution.

REASONS FOR GRANTING THE PETITION

The Circuit Court of Appeals held that the Revenue Act imposed a tax on income derived from criminal operations but that a taxpayer can not be required to file a return of such income because of the protection afforded by the Fifth Amendment. Since a return must be complete and truthfully disclose all income, a consequence of the decision below is that no person any part of whose income is derived from criminal operations need file any return.

The result of the decision of the Circuit Court of Appeals is to leave this whole subject in considerable confusion. The Treasury Department states that vast sums have been collected in the form of income taxes on incomes known to have been derived from operations in violation of law. The proper administration of the income tax law seems to require an authoritative settlement of both of the questions involved in this case.

Wherefore it is respectfully submitted that this petition for a writ of certiorari be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1927.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The District Court rendered no opinion. The judge's charge to the jury will be found at page

110 of the record. The opinion of the Circuit Court of Appeals (R. 142) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 149.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936).

STATEMENT

A statement of the facts and of the questions presented and copies of the applicable statutes will be found in the preceding petition.

ARGUMENT

The question whether the Fifth Amendment is violated by requiring the filing of income tax returns by those all or part of whose income is derived from criminal operations is clearly one of importance in the practical administration of the revenue Acts.

Ordinarily, a court will not approach or decide a constitutional question if a decision of that question may be avoided by passing on preliminary questions of interpretation of statutes. The consideration of this case would seem to require, first, an interpretation of the Revenue Act of 1921 with respect to the question whether Congress intended to tax income derived from illegal operations, and, second, whether the information required to be contained in

income tax returns would be incriminating, and if so, whether the requirement of a return violates the Fifth Amendment.

The question of interpretation of the revenue Acts as requiring the taxation of income from criminal occupations was dealt with in the opinion below, and also by the Circuit Court of Appeals of the Second Circuit in *Steinberg* v. *United States*, 14 F. (2d) 564, and with some dissent the conclusion was reached that it was the intention of Congress to tax such income.

It is a question about which there has been some difference of opinion, and it would be of great advantage in the administration of the revenue Acts if the question is finally settled.

But when that question is resolved as it was by the court below, the conclusion that no income tax return need be filed by any taxpayer whose income, in whole or in part, is derived from criminal conduct leaves the administration of the revenue Acts, as applied to such situations, in the greatest confusion.

The provision in Section 3167 of the Revised Statutes, as amended by Section 1311 of the Revenue Act of 1921, does not extend to one making incriminating disclosures in a tax return immunity coextensive with the protection afforded by the Fifth Amendment, if the Amendment be construed to apply to the case. The difficulties resulting from the decision of the court below can not, as a prac-

tical matter, be cured by an amendment to the statutes allowing immunity from prosecution for criminal misconduct to any taxpayer who returns as income the gains from his criminal occupation. Such a provision would offer an opportunity to any criminal who could conceal his offenses until the arrival of the date for filing an income tax return to acquire immunity by the mere act of filing his income tax return.

The authorities, while meager, indicate that the making of a tax return under circumstances such as are here involved is not self-incrimination within the meaning of the Fifth Amendment.

A tax return is nothing other than an official record upon which a taxpayer is required by law to state the account for taxes between himself and his Government. It is thus clearly impressed with a public interest or quality. The rule that the protection against self-incrimination does not apply to public records is well established.

The rule applies to records required by law to be kept by a private citizen for some governmental purpose. Wigmore on Evidence (2d Ed.), Vol. 4, Sec. 2259(c).

In the leading case of *Boyd* v. *United States*, 116 U. S. 616, this Court pointed out the analogy between the Fourth and Fifth Amendments and the object of both to protect the citizen from compulsory testimony against himself, but stated that there were necessarily excepted therefrom certain articles, writings or things, and particular mention was

made of the manufacture or custody of excisable articles "and the entries thereof in books required by law to be kept for * * * inspection" (p. 623).

In *Wilson* v. *United States*, 221 U. S. 361, where the right was sustained to compel a corporate official to produce corporate books over his personal objection that they would incriminate him the same as if they were his own, this Court discussed the rule respecting public records, and stated that the principles applied not only to public documents in public offices—

> * * * but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained (p. 380).

This Court, in support of the above statement, cited with approval such cases as *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666. In the former there was a statute requiring the defendant, who was a druggist, to keep a record of sales of intoxicating liquors, and in the latter there was a requirement that a druggist should preserve prescriptions compounded by him. These, manifestly, were not corporate records or documents in public offices; yet the public interest in the citizen's private business had resulted in the enactment of

statutes requiring the keeping of records which thereby became impressed with such a public character as to require their production and use over the objection of self-incrimination.

Federal cases to the same effect are *United States* v. *Sherry*, 294 Fed. 684, and *United States* v. *Mulligan*, 268 Fed. 893. The latter case arose under the Lever Act. While this Court subsequently, in *United States* v. *Cohen Grocery Company*, 255 U. S. 81, held a portion of the Lever Act invalid, it was not upon any point discussed in the *Mulligan case*, and such holding does not militate against the reasoning of the court in that case upon the doctrine declared in the *Wilson case*.

The cases so far cited related to public records already in existence, while in the case at bar we are concerned with records which had not yet been created and which it is sought to require the taxpayer to bring into existence; but the rule does go that far. *State* v. *Hanson*, 16 N. D. 347; *People* v. *Rosenheimer*, 209 N. Y. 115; *Ex parte Knoedler*, 243 Mo. 632; Wigmore on Evidence (2d Ed.), Vol. 4, Sec. 2259 (c).

In *United States* v. *Sischo*, 262 U. S. 165, it was decided that a master or owner of a vessel was required to list on his manifest smoking opium despite the fact that its importation was prohibited by penalty and forfeiture. The court below had held that such opium was not required to be listed on the manifest because it was not "merchandise"

within the meaning of that word. The case was first affirmed by an equally divided court, but upon reargument was reversed by a unanimous court. In its opinion this Court said (p. 167):

> There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a prohibition and a tax.

The question of incrimination was not considered or decided.

It was held in *United States* v. *Dalton*, 286 Fed. 756, that the immunity from being compelled to give incriminating testimony secured by the Fifth Amendment to the Constitution has no application to declarations required on entries of goods under the custom laws.

In *Harford* v. *United States*, 8 Cranch 108, it was held that articles whose importation was prohibited were nevertheless subject to the provisions of the custom laws prohibiting unlading without a permit, and *Marks* v. *United States*, 196 Fed. 476, upheld an indictment for manufacturing smoking opium without a license and bond long after the importation of such opium was absolutely forbidden.

In the *Sischo case*, one of the reasons urged in the petition for rehearing was the following:

> Unless a clear interpretation of the word "merchandise" is secured from this court, we may find bootleggers and rum runners who have amassed considerable fortunes

> through the sale of prohibited liquor for beverage purposes, contending that they are excused from filing an income-tax return on the ground that the filing of this return would be forcing them to give evidence against themselves of the commission of a crime and pleading the alleged exemption granted them by the Constitution.

There is also the question whether any information such as is required to be furnished in an income-tax return is of such a character as to indicate that there "is some tangible and substantial probability" that the statements in the return may help to convict the taxpayer of a crime. See *Ex parte Irvine*, 74 Fed. 954.

The description of the business of the taxpayer required to be stated in the income-tax return need not be so specific or exact as to disclose an illegal occupation. If the return itself would not disclose incriminating matters, the fact that requests for additional information by agents of the Bureau of Internal Revenue might do so would not relieve the taxpayer from filing the return.

There is also presented the question at what point in the proceedings the taxpayer must claim the privilege. In the case at bar, although the accused, when asked orally for information about his affairs subsequent to the date when his tax return should have been filed, refused to give any information to the revenue agents on the ground that it might incriminate him, the question of self-incrimination

was not raised in any other way or form at the time his return should have been filed nor in the District Court, and was not mentioned until the case reached the Circuit Court of Appeals. In the District Court the accused took the stand in his own behalf and voluntarily testified to the nature of his criminal operations in an effort to establish the fact that he had no income to return.

CONCLUSION

We think it sufficiently appears the questions presented in this case are of such a nature as to justify the assertion that the case comes within the provisions of Paragraph 5 of Rule 34, which states the considerations controlling in the matter of issuing writs of certiorari, and it is respectfully submitted that the petition should be granted.

Respectfully submitted.

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JANUARY, 1927.

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No. 851

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARIE S. SULLIVAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The judge's charge to the jury will be found at page 88 of the record. The opinion of the Circuit Court of Appeals (R. 111) is reported in 15 F. (2d) 809.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 117.) Petition for certiorari was filed January 25, 1927, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936). The petition was granted March 7, 1927.

QUESTIONS PRESENTED

This case involves the following questions:

(1) Does the Revenue Act of 1921 disclose an intention on the part of Congress to impose an income tax on gains derived from illicit traffic in liquor in violation of the National Prohibition Act?

(2) Assuming, as courts below have uniformly held, that Congress did intend to tax income derived from unlawful activities, is the provision of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself violated by the requirement that a taxpayer, whose income is partly or wholly derived from an unlawful source, must make an income-tax return?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The pertinent language of the Fifth Amendment is—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 223 (a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 250) provides as follows:

> That the following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—
>
> (1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,000 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

Section 212(a) provides (p. 237):

That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

Section 213 provides (p. 237):

That for the purposes of this title * * * the term "gross income"—

(*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income

derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(*b*) Does not include the following items, which shall be exempt from taxation under this title [exempting 12 items, none of which include the income from such a source as here involved and none of which are pertinent to the question here presented].

Section 214 provides (p. 239):

(*a*) That in computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *;

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business * * *;

* * * * *

(7) Debts ascertained to be worthless and charged off within the taxable year (or, in

the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part:

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913; * * *.

Section 1300 provides (p. 308):

* * * every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

Section 1307 provides (p. 310):

That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax.

Section 228 (p. 252) provides:

That if the collector or deputy collector has reason to believe that the amount of any income returned is understated, he shall give

due notice to the taxpayer making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated, may increase the same accordingly. Such taxpayer may furnish sworn testimony to prove any relevant facts and if dissatisfied with the decision of the collector may appeal to the Commissioner for his decision, under such rules of procedure as may be prescribed by the Commissioner with the approval of the Secretary.

Section 1308 provides (p. 310):

That the Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Section 1309 (p. 310) provides:

That no taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books

of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

Section 1310(a) (p. 310) provides:

That if any person is summoned under this Act to appear, to testify, or to produce books, papers or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Section 257 provides (p. 270):

That returns upon which the tax has been determined by the Commissioner shall constitute public records; but they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President * * *.

Section 1311 amends Section 3167 of the Revised Statutes to read as follows (p. 311):

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses,

expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Section 253 provides (p. 268):

That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title,

or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

Section 1311 amends Section 3173 of the Revised Statutes to read as follows (p. 312):

It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, (1) in case of a special tax, on or before the thirty-first day of July in each year, and (2) in other cases before the day on which the taxes accrue, to make a list or return, verified by oath, to the collector or a deputy collector of the district where located, of the articles or objects, including the quantity of goods, wares, and merchandise, made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership, firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, article or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose

the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further,* That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do

so at the time required, or delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, or refuses to allow any regularly authorized Government officer to examine the books of such person, firm, or corporation, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person or any other person he may deem proper, to appear before him and produce such books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned: * * *.

Section 1311 amends Section 3176 of the Revised Statutes to read as follows (p. 313):

If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by

regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return or list is due to sickness or absence, the collector may allow such further time, not exceeding thirty days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner of Internal Revenue shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the fail-

> ure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner of Internal Revenue shall add to the tax 50 per centum of its amount.
>
> The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.

Section 1303 provides (p. 309):

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.
>
> * * * * *

Pursuant to this authority, Treasury Regulations No. 62 were promulgated. Articles 401 and 402 thereof require that the return of an individual with a gross income of more than $5,000, within which class it is claimed respondent in this case falls, shall be on Form 1040. Article 407 of Regulations 62 further provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return.

> Taxpayers not supplied with the proper forms should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form.

At the top of page 1 of Form 1040 (copy in appendix hereto) is a blank space headed "Occupation, Profession, or Kind of Business," and on the back of the form Instruction 16(c) reads: "Describe the business or profession in the space provided on page 1, as 'grocery,' 'retail clothing,' 'drug store,' 'laundry,' 'doctor,' 'lawyer,' 'farmer,' etc., and fill in Schedule B, page 2 of the return." Schedule B relates to inventories, bad debts, expenses, etc., some of which items must be particularly described. For example, Instruction 13 on the back of the return provides that "Any amount claimed as a deduction for necessary expenses

* * * should be fully explained in Schedule G, page 2 of the return, or in an attached statement." Instruction 16(c) provides that "If you are engaged in a trade or business in which the production, purchase, or sale of merchandise of any kind is an income-producing factor, secure from the Collector of Internal Revenue and file as a part of this return a *Certificate of Inventory, Form 1126.*" (Copy in appendix.) Such certificate calls for no details other than the total values entirely without regard to the kind and quality of merchandise carried in the business. The inventory itself does not accompany this certificate.

Treasury Decision 2962, promulgated January 7, 1920 (Vol. 22 T. D. Int. Rev., p. 7), reads in part as follows:

> No specific provision is made in the statutes for furnishing a copy of an income return to anyone. Authority to permit inspection does not carry with it authority to furnish a copy. Implied authority to furnish a copy is contained in several provisions of law constituting returns public records, and in sections 161 and 251, Revised Statutes, which confer upon the Secretary of the Treasury broad power to make rules and regulations concerning "custody, use, and preservation of the records, papers, and property" of the department and the enforcement of the internal-revenue laws. Because of the provisions contained in section 3167, Revised Statutes, as amended * * * a copy of an income return can not be fur-

nished, except as provided by law, to anyone except the person or persons who made the return. * * * There are numerous provisions in the statutes constituting the doing or failure to do certain things offenses against the United States, and providing for collecting unpaid taxes by suits in court and for bringing suits to recover taxes and penalties wrongfully collected. These provisions would be of no avail were it held that the returns themselves, or certified copies thereof provided for in section 882, Revised Statutes, could not be used by the Government as evidence in such litigation or in preparation for same. Manifestly Congress did not, when it enacted section 3167, Revised Statutes, intend to defeat prosecutions and suits in court for which it has specifically provided.

Income returns filed with the department are public records of the department, and public records in the Treasury Department are of right available as evidence in litigation in court unless there is some statute making it unlawful to use them as such. (*Winn* v. *Patterson*, 9 Pet., 663, 677; *Evanston* v. *Gunn*, 99 U. S., 660; 17 Cyc., 306; *Williams* v. *Conger*, 125 U. S., 397, 410; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S., 286, 298; *Oakes* v. *U. S.*, 174 U. S., 778; *Texas, etc., Ry. Co.* v. *Swearingen*, 196 U. S., 51, 60.) As, therefore, the use of income returns or copies thereof in connection with litigation in court, where the United States Government is interested in the result, is provided for by law, such returns or copies

may be furnished for such use without a violation of the provisions of section 3167 Revised Statutes, as amended.

STATEMENT

Two indictments were returned against respondent in the Eastern District of South Carolina. One indictment charged perjury in connection with an income-tax return for the year 1919, in violation of Section 125 of the Penal Code. (R. 4.) The other indictment, filed March 6, 1923, was in three counts, and charged evasion of income taxes, in violation of Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921, *supra*. The first count charged respondent with filing a false and fraudulent income-tax return for the year 1919, while the second and third counts (the latter being the only count with which we are here concerned) charged willful refusal to file returns for the years 1920 and 1921, respectively, alleging that in each of said years he had received profits of $10,000 from his automobile agency and his business of selling beverages. (R. 1–3.) The two indictments were consolidated, and the case was tried at the January, 1926, term of the District Court, at Charleston, South Carolina. (R. 4.) Prior thereto respondent had been tried and acquitted of conspiracy to violate the National Prohibition Act and had pleaded guilty and paid a fine for the transportation and possession of liquor in violation of the National Prohibition Act. (R. 56–57.) In the instant case

respondent appeared without counsel, entered a plea of not guilty as to both indictments and conducted his own case. (R. 4.)

When interviewed in 1922 by revenue agents with respect to his income-tax liability respondent refused to give any information as to the source of his income, on the ground that to do so would incriminate him (R. 11, 12, 18, 27), but no claim of privilege respecting his failure to file a return was made or suggested until he reached the Circuit Court of Appeals in this case. At the trial he voluntarily took the stand in his own behalf and testified freely that during the years covered by the indictments he was engaged in the unlawful sale of liquor and defended on the ground that instead of conducting said business at a profit it had been conducted at a loss. (R. 55–80.) A part of his gross income was derived from lawful transactions (R. 3, 12, 16, 24, 28, 62), but the amount does not appear, so it was not shown that he had sufficient ($5,000) gross income from lawful sources to require a return as to that. The jury returned a verdict of not guilty on the perjury indictment, a verdict of not guilty on the first and second counts of the income tax evasion indictment, and a verdict of guilty on the third count of the latter indictment which charged willful refusal to file a return for 1921. (R. 106.) A motion for a new trial was made and refused; whereupon, on January 25, 1926, a sentence of six months in jail was duly imposed. (R. 107.)

On the same date respondent sued out a writ of error from the Circuit Court of Appeals for the Fourth Circuit. (R. 109.) Four errors were assigned. Assignments 1, 2, and 3 were as to the admissibility of certain evidence, and the fourth assignment was on the refusal of the judge to direct a verdict of acquittal "on the ground that on the whole evidence the Government had failed to make out its case against defendant." (R. 108–109.) In his brief and upon argument before the Circuit Court of Appeals respondent waived the first three assignments of error, and thereupon set up for the first time the contention that there should have been a directed verdict because (1) unlawful gains were not income within the meaning of the Revenue Act of 1921 and (2) that, in any event, he was relieved from the duty of making a return by the provision of the Fifth Amendment to the Constitution that no person "shall be compelled in any criminal case to be a witness against himself."

The Circuit Court of Appeals (R. 117) reversed the judgment of conviction of the District Court on the theory that, although Congress has the power and by the Revenue Act of 1921 manifested an intention to tax the gains of criminal transactions, said Act (1) does not furnish to one who makes incriminating disclosures in his income tax return an immunity from prosecution equivalent to the protection afforded by the Fifth Amend-

ment, because, under *Counselman* v. *Hitchcock*, 142 U. S. 547, and *Brown* v. *Walker*, 161 U. S. 591, the protection of secrecy conferred by Section 3167 of the Revised Statutes, as amended by Section 1311 of the Revenue Act of 1921, falls short of that secured by the Fifth Amendment; and (2) that the privilege against self-incrimination furnishes a complete defense to an indictment charging any natural person under Section 253 of the Revenue Act of 1921 with failure to file a return of income as required by Section 223 (a) of said Act when the return, if filed, would disclose that income was earned in the course of the commission of a crime, because, under *Boyd* v. *United States*, 116 U. S. 616, and *Arndstein* v. *McCarthy*, 254 U. S. 71, the written statements under oath in the return of the taxpayer in answer to questions propounded therein must be held to be the testimony of a witness, and amount to self-incrimination if they disclose the commission of a crime. (R. 111–117.)

On the other hand, the Government contends, first, that the return of income as required by Section 223 of the Revenue Act of 1921 compels no disclosures incriminating in character; second, that the defendant did not, in the proper manner or in timely season, claim the constitutional privilege which he asserts his lawbreaking activities give him from filing the return; and, third, that the protection against self-incrimination does not apply to tax returns, since they are in the nature of public records required by law to be made.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the judgment of the District Court and holding that Section 223 (a) of the Revenue Act of 1921, *supra*, so far as it requires the filing of a tax return by one whose income is derived from the illegal sale of beverages is in conflict with the self-incrimination clause of the Fifth Amendment to the Constitution.

SUMMARY OF ARGUMENT

The gains and profits derived from illicit traffic in liquor constitute income. It has been uniformly held by the courts that such income was intended by Congress to fall within the purview of the Income Tax Act of 1921. This interpretation is shown by the all-inclusive language used by Congress to define income and by the history of the changes in income-tax legislation. The questions asked in the required income tax return, Form 1040, do not compel the disclosure of any fact which tends to incriminate. Only information of the most general character relating to the nature of the taxpayer's business is demanded, none of which in itself constitutes proof of unlawful dealings. In determining the nice balance that exists between the constitutional rights of the individual and the sovereign's right to compel information necessary for governmental purposes the courts will go as far "as may be consistent with the lib-

erty of the individual." This is illustrated in *Mason* v. *United States,* 244 U. S. 362, and *Ex parte Irvine,* 74 Fed. 954.

The taxpayer will not be permitted to set himself up as the judge of his rights under the Fifth Amendment. He must comply with the Government's demand on him for information at least to the point where the information would tend to incriminate. *Podolin* v. *Lesher Warner Dry Goods Company,* 210 Fed. 97.

In this case respondent failed to raise any claim of immunity he might have had under the Fifth Amendment in the proper manner or form, and in the failure to do so his privilege must be deemed to be waived. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* No. 111, October Term, 1926, decided January 3, 1927.

A tax return is the statement of account between the taxpayer and his Government. It is impressed with a public interest and constitutes a public document. The cases of *Boyd* v. *United States,* 116 U. S. 616, and *Wilson* v. *United States,* 221 U. S. 361, both recognize that records required by law to be kept constitute an exception to the application of the Fifth Amendment. Numerous State cases have recognized this principle. *United States* v. *Sischo,* 262 U. S. 165, is authority for the Government's contention herein, because the effect of the Fifth Amendment on the interpretation contended for by the Government of the statute requiring manifests underlay the whole case.

The effect of the interpretation of the Circuit Court of Appeals of the Income Tax Act in this case would be to favor the lawbreaker and excuse from the operation of the Income Tax Act any person who set up a claim that his income had been derived even in part from criminal operations. Such interpretation is to be avoided because it is contrary to the purposes of the Act and is not demanded by a proper application of the Fifth Amendment.

ARGUMENT

I

THE GAINS DERIVED FROM ILLICIT TRAFFIC IN LIQUOR ARE TAXABLE INCOME WITHIN THE INTENT OF THE REVENUE ACT OF 1921

The court below decided this point in favor of the Government and rested its reversal upon constitutional grounds, but as this Court ordinarily will not approach or decide a constitutional question if a consideration of that question may be avoided by passing upon preliminary questions of statutory interpretation (*United States* v. *Katz*, 271 U. S. 354) it is deemed advisable in this brief to deal with the interpretation of the statute.

Intrinsically the gains and profits of this respondent constitute income. The record discloses the fact that he realized some profit (amount undetermined, R. 3, 12, 16, 24, 28, 62) from the lawful business of selling trucks and automobiles. The rest of his profits were realized not only from the purchase and sale of intoxicating liquors (R. 56–

57), but also from the compensation for illegal transportation of liquor for others (R. 80–82). The Government maintained that he should have made an income tax return of all of this for the taxable period. It is impossible from the record to divide his profits which are admittedly income from the lawful automobile business from profits arising from unlawful operations. But the latter as clearly constitute income as the former, and differ in no respect from gains and profits realized from dealings in other commodities or by dealings in intoxicating liquor for lawful purposes. The fruits of such transactions were in either case his as against all the world. The liquor in which he dealt might have become, if seized and condemnation proceedings had, forfeit to the Government. But after the respondent's dealings were completed, the profits he made therefrom were his property. In this respect they are totally unlike stolen or embezzled money, which has been held not to be income for want of title in the thief or embezzler. *Rau* v. *United States*, 260 Fed. 131 (C. C. A. 2d).

That Congress has the power to tax income from unlawful sources there can be no doubt. As stated by this Court in *United States* v. *Stafoff*, 260 U. S. 477, 480, "Of course Congress may tax what it also forbids." See also *Murphy* v. *United States*, No. 443, October Term, 1926, decided December 6, 1926; *United States* v. *Yuginovich*, 256 U. S. 450; and the *License Tax Cases*, 5 Wall. 462.

The fact that the taxes considered in those cases were excises, while we are here dealing with an income tax, can make no difference in principle. This Court has repeatedly held that the only effect of the Sixteenth Amendment on the taxing power was to remove the requirement for apportionment. *Eisner* v. *Macomber*, 252 U. S. 189; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103. If Congress has power to levy excises upon things which are outlawed, it would seem necessarily to follow that it likewise has power to levy an income tax on the gains derived from the dealings in such outlawed things. The only question for determination, therefore, is whether Congress in the Revenue Act of 1921 intended to and did exercise its power to tax income "from whatever source derived" irrespective of the legality of that source.

The language Congress has chosen to describe income discloses an all-inclusive intent. The language that Congress has used to enumerate those who must file income-tax returns discloses an intent to reach everybody. Sections 210 and 211 of the Revenue Act of 1921, *supra*, levied normal and surtaxes upon the net income of *every individual*. Section 212(a) defines the term "net income" to mean the gross income as defined in Section 213, less the deductions allowed by Section 214, and Sec-

tion 213(a) provides that the term "gross income"—

> Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Section 213(b) specifies the only items of income which Congress has exempted from taxation under that title. Income from unlawful sources is not included among the exemptions either specifically or by inference.

What clearer terms could Congress have used than the above statutory definition to indicate an intent to exercise its power to tax incomes to the fullest extent conferred by the Sixteenth Amendment? Wealth in the form of income amassed from year to year by individuals and corporations comes from activities lawful and unlawful, vocations and businesses of many kinds. A business in which illegal methods are resorted to may be productive of greater income than one conducted wholly within the law. Entirely outlawed enterprises of wide scope and potentialities for

sudden wealth are too well known to assume that Congress was unaware of them when using all-inclusive language to define the incomes reached by the taxing statutes. Congress could not have used such language, and at the same time intended to exclude wealth unlawfully acquired from the operation of the statute, except through ignorance of such sources of wealth. It is much more reasonable, we submit, to assume that Congress intentionally chose the all-embracing language in Section 213(a), having in mind the definition of "business" as laid down by this Court in *Flint* v. *Stone Tracy Company*, 220 U. S. 107, 171, where it said:

> "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. 1, p. 273.

Can it be successfully maintained that the gains of one who systematically engages, as did respondent, in the purchase and sale of prohibited articles, or who receives compensation for services rendered to others in violating the law, was not intended by Congress to be income derived from business merely because that business happens to be unlawful? Is it not rather the income of one who "occupies" his "time, attention and labor * * * for the purpose of a livelihood or profit"? Is it not plainly income from a "vocation"?

The word " vocation " is used in the income tax laws of Great Britian as well as those of the United States; and as early as 1886 the courts of Great Britian gave to that word the meaning for which the Government here contends. In *Partridge* v. *Mallandaine,* decided by the High Court of Justice (Queen's Bench Division), 2 Great Britain Tax Cases, 179, it appears that the "appellants stated that they had no profession or employment but that they attended race courses as bookmakers or betters on horseracing * * * and that the profits made by them from attending race courses and betting as aforesaid were not legal profits or gains, and were not assessable to the income tax." In holding that such gains were intended to be taxed, Denman, J., stated (p. 180):

> The way in which the contention is stated in the case is this: "The surveyor contended that betting systematically and annually carried on came within the provisions of the Income Tax Act as a vocation." Now, the case states enough for us. It finds here that it is stated that these two persons are persons who in partnership attend races, and systematically and annually carry on that business or that pursuit so as to make profits. We must assume then for this purpose that the question is whether the Income Tax Commissioners are right in holding that it was a vocation within the meaning of Schedule D. Now, I think they were quite right. The words are "profession, em-

ployment, or vocation." I do not feel myself disposed to put so limited a construction upon the word "employment" as Mr. Graham desires us to put upon it. I do not think "employment" necessarily means a case in which a person is set to work by other means to earn money. A man may employ himself in order to earn money in such a way as to come within that definition, but I think the word "vocation" is a still stronger word. It is admitted to be analogous to the word "calling," which is a very large word; it means the way in which a person passes his life, and it is a very large word indeed. These persons go to races and they systematically bet, and for this reason, it must be assumed, make profits. Does it lie in their mouths to say that they are not to be assessed to income tax because they can not bring an action in respect of the bets which they make? Every year they have so many of their bets paid as puts, say, 1,000*l.* a year in their pockets; and to say that because they can not bring an action to recover the bets they make, betting being made illegal by Act of Parliament, therefore they do not carry on a vocation, it seems to me is putting a construction upon the Act which would be giving a very undue favour to persons with whom the Legislature is by no means disposed to deal with favour, inasmuch as the thing they do is a thing which is hampered by the Legislature because it is supposed to be mischievous, namely, the

> recovery of bets by actions so as to facilitate the making of bets and the carrying on of vocations such as this. *But I go the whole length of saying that, in my opinion, if a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of 2,000l. a year, the Income Tax Commissioners would be quite right in assessing him* if it were in fact his vocation. There is no limit as to its being a lawful vocation, nor do I think that the fact that it is unlawful can be set up in favour of these persons as against the rights of the revenue to have payment in respect of the profits that are made. *I think this does come within the definition of the word "vocation" according to common sense and according to the ordinary use of language,* and therefore I think the Income Tax Commissioners were right. (Italics ours.)

Substantially the same question came before the Board of Tax Appeals in the case of *Appeal of James P. McKenna,* 1 B. T. A. 326 (1925), and *Appeal of Mitchell M. Frey, Jr.,* 1 B. T. A. 338 (1925). In the *McKenna case,* following the reasoning of the English court in the *Partridge case, supra,* the Board says, p. 329):

> It is contended by the taxpayer that winnings on gaming contracts do not constitute gains, profits, and income within the meaning of the revenue act just quoted, because such contracts are illegal and have no recog-

> nition at law, and that the language of the act has application to gains, profits, and income from legal transactions and sources only. We do not think this contention well founded. In the first place the words "from any source whatever" are as broad and comprehensive as it is possible for language to be. There is no limitation that the gains, profits, and income must be legally received. To read the above quoted section of the statute as if it were "from any *legal* source whatever" would be to read into the statute something which Congress did not see fit to incorporate therein. To do so would be to legislate rather than to interpret, and this we have no authority to do. In our opinion Congress meant precisely what it said when it included gains, profits, and income from any source whatever, irrespective of the nature of that source.

The precise question in the case at bar, that is, the taxability of the income from traffic in illicit liquor under the Revenue Acts of the United States was before the Circuit Court of Appeals for the Second Circuit in *Steinberg* v. *United States*, 14 F. (2d) 564. The court said (pp. 566, 567):

> That a given sinner or criminal must, in the pursuit of his or her prohibited vocation, break many laws to obtain the wherewithal to satisfy the taxing law, must be regarded as immaterial, for the whole matter is covered by one remark of Holmes, J., in *United States* v. *Stafoff*, 260 U. S. 477,

> * * * "*Of course* Congress may tax what it also forbids." This is compendious enough, and was said about liquor; and equally is it of course that, if the Legislature can tax the liquor which it forbids, it can also tax the gains made by dealing in that which is forbidden.
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> * * * * *
>
> * * * The question is not whether this is wise or politic, fair or in good taste, but whether it can legally be done. We think it can under the language of the statutes, and know that similar things have been done for generations.
>
> * * * * *
>
> Thus we hold that the unknown increment above the sum reported for 1921 as Steinberg's income was taxable, and he was punishable for concealing the facts under Section 253 of the statute.

The question whether the gains from illicit traffic in liquor fell fairly within the general intent of the Canadian Income Tax Act was decided by the Privy Council of Great Britain in the case of *Cecil R. Smith*, opinion delivered July 27, 1926, not yet reported, but set forth in the appendix hereto. This case involved an appeal from the decision of the Supreme Court of Canada, which reversed a decision in the Exchequer Court holding that profits arising within Ontario from the illicit traffic in liquor contrary to the provisions of provincial legislation were taxable income as defined by the Income

War Tax Act of 1917, as amended. In its opinion by Viscount Haldane sustaining the tax on income from such illicit traffic, the Judicial Committee of the Privy Council stated as follows:

> Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

The decision of the Circuit Court of Appeals for the Second Circuit in the *Steinberg case* and the decisions of the Board of Tax Appeals in the *McKenna* and *Frey cases* find direct confirmation in the history of the Revenue Acts. In the first Revenue Act passed after the adoption of the Sixteenth Amendment, that of 1913 (c. 16, 38 Sat. 114, 167), Congress evinced an intention to exclude from the operations of the Act income derived from unlawful activities. In that Act, Congress restricted income from business solely to that derived from "the transaction of any *lawful* business carried on for gain or profit," etc. It is significant, however, that the word "lawful" was dropped from the definition of income in the very next Revenue Act passed, in 1916 (c. 463, 39 Stat. 756, 757), and it has never reappeared in any of the revenue laws subsequently enacted. To have thus restricted the application of the Income Tax Act in the first law and then to have dropped the restricting word can admit of but one conclusion, to wit, that Congress, by the change of language, changed its intent. To hold now that income does not include unlawful gains would be to read back into the law the word "lawful." As said by this Court in *Carey* v. *Donohue*, 240 U. S. 430, 437, "we are not at liberty to supply by construction what Congress has clearly shown its intention to omit."

Accordingly, the Treasury Department has consistently from 1916 down to the present time interpreted the several Revenue Acts as applying to in-

come from all sources, whether lawful or unlawful. The courts give great weight to such a uniform departmental construction, particularly when Congress in subsequent legislation in reenacting the same provisions fails to indicate in any way its disapproval of the settled construction of the Department. *Swigart* v. *Baker*, 229 U. S. 187; *United States* v. *G. Falk & Brother*, 204 U. S. 143; *Komada* v. *United States*, 215 U. S. 392; *United States* v. *Hermanos y Compania*, 209 U. S. 337, and numerous other cases to the same effect.

All of the courts before whom this question has come have sustained the contention of the Government that Congress intended to tax income from unlawful sources. But in arriving at that conclusion they have indulged in considerable discussion of objections that may be raised to such a conclusion. These objections all relate to the difficulty or impropriety of applying certain administrative provisions of the Revenue Acts to illegal businesses rather than to what Congress actually intended. They are set forth at length in the dissenting opinion in the *Steinberg case*, *supra*. These objections, considered and summarized by the court below, may be reduced to three in number.

First, it is objected that (R. 112, opinion of court below)—

> The taxpayer is not only to make a return, stating the items of his income under section 223 as pointed out above, but is required by

> section 1300 (42 Stat. 308) to keep such records and render under oath such statements and returns, and to comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary, may from time to time prescribe. The criminal would be compelled to keep a business record of his crime.

This objection proceeds upon the theory that this offends the Fifth Amendment. That is one of the questions before this Court in the case at bar. We believe it is fully answered in the succeeding arguments in this brief in which it is contended, first, that the information required to be stated in income tax returns is not such as is incriminating in character, and, second, that tax returns, being public records required to be made by law, are not within the protection of the Fifth Amendment. If the Government is correct in either of these positions, then the above objection is not valid.

Second, it is objected that (R. 112, opinion of the court below)—

> Section 214 of the act (42 Stat. 239) provides for the deductions allowable in computing the net income of the taxpayer, and specifies that they shall include all the ordinary and necessary expenses paid or incurred in carrying on the business; and thus the law would seem to impose upon the Government, in order to ascertain the net income of an illicit trade, the duty to examine, if not to allow such expenses as the bribery of officials and others equally obnoxious.

Of course Income Tax Acts do not allow deductions for all expenses. They recognize only necessary and ordinary expenses, and bribery of officials is neither of these. Furthermore, the objection relates entirely to a matter of policy which is for Congress and not for the courts. That Congress intended to adopt the policy of applying all the provisions of the Tax Act to unlawful businesses we believe to be sufficiently shown by the dropping of the word "lawful" from the Revenue Acts, which has been discussed above. The objection proceeds upon the theory that taxation must be a form of license. The answer to that, and the advisability of adoption by Congress of the policy of taxing the fruits of unlawful business can not be better stated than by Judge Cooley in *Youngblood* v. *Sexton*, 32 Mich. 406, whose comments are quoted herewith as pertinent reasoning (pp. 421, 426):

> The idea that the state lends its countenance to any particular traffic by taxing it, seems to us to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens; they are necessary, it is true, to the existence of government, but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities, that under some circumstances

they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the Government when this burden, which may prove disastrous, is imposed upon it, while, on the other hand, it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine any citizen would prefer to be visited with the untaxed frowns of government rather than with those testimonials of approval which are represented by the demands of the tax-gatherer. * * *

If one puts the Government to special inconvenience and cost by keeping up a prohibited traffic or maintaining a nuisance, the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited, or which constitutes the nuisance, the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose and may sometimes be even more effectual. Certainly, whatever discriminations are made in taxation ought to be in the direction of making the heaviest burdens fall upon those things which are obnoxious to the public interests, wherever that is practicable.

Third, it is objected that (R. 112, opinion of court below):

Section 1311 (42 Stat. 311) reenacts amongst others, section 3167 of the Revised

> Statutes which makes it unlawful (with certain exceptions discussed below) for any collector or officer or employee of the United States to divulge or make known to any person, the amount or source of income set forth or disclosed in any income return, or to permit any return or copy thereof to be seen or examined by any person, and any offense against this provision is a misdemeanor, punishable by fine or imprisonment; and it is suggested that Congress could not have intended to impose upon the agents and employees of the United States, under any circumstances, the obligation to keep secret information of the commission of crime which should come to them in their official capacity.

This objection is fully answered by Treasury Decision No. 2962, *supra*, to the effect that Section 3167 was not designed to and does not prevent the use of tax returns in prosecutions and suits in court where the United States is interested.

There is less contradiction between an intent on the part of Congress to prohibit the illicit traffic in liquor and at the same time to tax the income from such traffic than there would be to prohibit the traffic and exempt from taxation gains therefrom. Despite hypothetical inconsistencies which may be argued from the prohibition of traffic in beverage liquor and the interpretation of the Income Tax Act contended for, and the difficulties of administrative application to lawbreakers which may be

foreseen, we maintain that it was the intent of Congress to catch within the net of the Revenue Act of 1921 income derived from every source. If a contrary interpretation be established, then, as stated by this Court in *Irwin* v. *Gavit*, 268 U. S. 161, 166, the Revenue Act—

> has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent.

II

THE INFORMATION REQUIRED TO BE STATED IN AN INCOME TAX RETURN IS NOT SUCH THAT IT MIGHT INCRIMINATE

By virtue of the substantial character of the privilege of the Fifth Amendment that "no person * * * shall be compelled in any criminal case to be a witness against himself" it was early settled that not only is the protection against the compulsory direct admission, but also against the compulsory disclosure of any fact which furnishes a "necessary and essential part of a crime." Chief Justice Marshall in *In re Willie* (Burr's trial), 25 Fed. Cas. No. 14692e, 38, 40. But it is only such a fact which may be withheld. Unless the fact is clearly a "necessary and essential part of a crime" its disclosure in an appropriate proceeding may be compelled. Moreover the court must have reasonable ground to fear danger to the party from the use of his answer in subsequent proceedings, since the protection "does not extend to remote possibili-

ties out of the ordinary course of law." *Heike* v. *United States*, 227 U. S. 131, 144.

In *Ex parte Irvine*, 74 Fed. 954, following the rule laid down by Chief Justice Marshall in the *Willie case*, *supra*, the court said (p. 960):

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that

> there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

A similar announcement of the rule is found in *Brown* v. *Walker*, 161 U. S. 591, 599.

Respondent was prosecuted for failure to fill out the tax return on Form 1040 (copy in appendix). Whether the Commissioner could have under the law demanded a return of detailed information of such a kind and character as to "furnish proof of a link in the chain of evidence necessary to convict him of a crime" and thus violate the rule against self incrimination, it is clear that this return did not do so. The information demanded in every blank in Forms 1040 and 1126 could have been furnished without giving a single, necessary or probable "link" in proving him guilty of law violation.

The details of his business were required under Schedule B, and No. 16 of the paragraphs of Instructions shows that information of the most general character is sufficient to comply with the demands of Schedule B. For example, although in respondent's own testimony in the court below it was disclosed that he was in the bootlegging business, had he complied with the statute and filled out Form 1040, he need not have revealed that fact. It would have been sufficient to meet the requirements of the return to have listed his business as "retail beverages" or "wholesale beverages." Such a description would have been as consistent with innocence as with guilt. Even if he had gone fur-

ther and supplied information not absolutely required, by describing his business as "liquor business" and that his gross income, expenses and losses therefrom each amounted to so much, such disclosures would not constitute "necessary and essential parts of a crime." Under the National Prohibition Act, not every sale of intoxicating liquor is criminal; possession of such liquor under some circumstances is not prohibited; nor is there any prohibition against the manufacture of intoxicating liquor under certain conditions.[1] It is only *unlawful* sale, possession, and manufacture which is condemned and made criminal.[2] Suppose respondent stated in his return that he was dealing in liquor. This in itself is no proof of unlawful dealings.

The lower court's position in this case rests upon a false premise, to wit, that in an examina-

[1] Act of October 28, 1919, c. 85, 41 Stat. 305, Title II, Sec. 3, sale, possession, manufacture, etc., permitted for nonbeverage and sacramental purposes; Sec. 4, possession of liquor to be used in manufacture of exempted articles; Sec. 33, possession in private dwelling for personal use; Sec. 37, manufacture of alcoholic liquors for use by denaturation in nonalcoholic beverages; Title III, Secs. 2 and 7, industrial alcohol plants and distilleries; Sec. 8, sale or other disposition of industrial alcohol.

[2] National Prohibition Act, *supra*, Title II, Sec. 3, manufacture, sale, possession, etc., forbidden except as authorized in Act; Sec. 6, manufacture, sale, etc., without permit; Sec. 10, manufacture, sale, etc., without making permanent record; Sec. 11, limitations upon sale by manufacturers and wholesale druggists; Sec. 25, possession of liquor or property intended for use in violating law; Title III, Sec. 20, manufacture, sale, possession, etc., in Canal Zone.

tion of Form 1040, under the Income Tax Act, there would from the four corners of the return itself be revealed incriminating facts. Such facts could only be regarded as incriminatory if they were supplemented by knowledge on the part of the court that the operations back of the income reported were in themselves unlawful. If by extrinsic evidence the respondent's commission of a crime is *prima facie* established and charged in an indictment or an information, then it is possible that in the trial of that case his income tax return might become "useful" in proving the extent of his criminal operations. But, as pointed out in the *Irvine case*, the mere statement of a man's name or his place of residence might later become useful to indentify him as a felon. It is not that information elicited by the income tax return might, in a hypothetical case, have evidentiary value, but the true test is, rather, whether the facts demanded in the return, viewed by themselves alone, furnish or show some tangible and substantial probability of furnishing an essential link in proving the taxpayer guilty of a crime.

Furthermore, the decision as to whether information demanded from a witness constitutes a violation of the Fifth Amendment is for the judge to determine in the light of the particular case before him at the time the privilege is claimed. Lower courts have applied the rule against self-incrimination with care and with "a due regard

for the right of the community to have the wheels of justice unclogged, as far as may be consistent with the liberty of the individual." The right of the sovereign to demand information in a tax return is one that may not be lightly restricted. We submit that only when clearly inconsistent with the liberty of the individual may any of the steps in collecting a tax be hampered. Such view is the manifestly fair one to both sovereign and citizen. Cases arise—and this may be one—where the courts should go to the very limit beyond which would be to impinge upon the guarantees of the Fifth Amendment. The contending rights of the lawbreaker and the sovereign's power to compel necessary information struck a delicate balance in the case of *Mason* v. *United States,* 244 U. S. 362. There this Court, interpreting the privilege of immunity claimed by the witness in the light of the circumstances disclosed in the record, upheld the lower court in denying the immunity claimed. A grand jury at Nome, Alaska, was investigating a charge of gambling in violation of Section 2032, Compiled Laws of Alaska, 1913, which makes it an offense to play cards for something of value. Mason, a witness before the grand jury, on the ground of self-incrimination, refused to answer the following questions: (1) "Was there a game of cards being played on this particular evening at the table at which you were sitting?" (2) "Was there a game of cards being played at another table at

this time?" Another witness, Hanson, also refused to answer, on the same ground, substantially similar questions. In holding that the witnesses were not relieved from answering such questions, this Court said (p. 367):

> No suggestion is made that it is criminal in Alaska to sit at a table where cards are being played or to join in such game unless played for something of value. * * *
>
> The court below evidently thought neither witness had reasonable cause to apprehend danger to himself from a direct answer to any question propounded and, in the circumstances disclosed, we can not say he reached an erroneous conclusion.

It is submitted that each case where immunity is claimed under the Fifth Amendment must rest upon its own particular facts. Weighing them herein, it is plain that the information demanded of Sullivan by performing his public duty to make an income tax return on Form 1040 was less incriminating than answering the questions propounded in the *Mason case* above. It was less incriminating because here on the face of the return not the slightest connection with unlawful enterprises was compelled. And the detail of the disclosures referred only to the amounts of gains and profits which, in the eyes of the law, were themselves untainted with illegality. Disclosing such gains and profits is too remote from the commission of a crime itself to fall within the protection of the Fifth Amendment. Giving the Government facts

about the amount of gains in any taxable year is far different from asking a witness whether or not he has purchased liquor to drink, as was the nature of the questions in *Ex parte Frenkel*, 17 Ala. App. 563, and in the *Matter of M. T. January*, 295 Mo. 653, in which cases the State courts upheld the right of witnesses to refuse to answer. The reply to the question whether a witness had purchased liquor for beverage purposes would, if answered in the affirmative, clearly involve the witness in the commission of a crime.

The difficulty in this case is that Sullivan substituted his own judgment for that of the court in deciding whether the information requested would reasonably have a tendency to incriminate him. The proper procedure would have been for him to have secured Form 1040 and therein either to have signified his privilege with respect to any particular question, the true answer to which he believed would tend to incriminate him, or leave blank the space provided for that answer.

To uphold respondent's contention in the court below that merely because he now alleges his business was unlawful, he was in 1921 excused from filing any return would be to sanction the noncompliance with the Income Tax Act on the part of any taxpayer who, when discovered, gives as a reason the fact that his profits, wholly or in part, have arisen from unlawful activities. An interpretation of the law the effect of which would be to place in the hands of the lawbreaker the opportunity to

exercise judicial interpretation of his constitutional rights, and to leave the judicial test of the soundness of his claim to the accident of later discovery that he relied on the Fifth Amendment to cloak his noncompliance with the statutes, is to be avoided if a contrary interpretation can be fairly found. In the case of *Podolin* v. *Lesher Warner Dry Goods Company* (C. C. A. 3rd), 210 Fed. 97 (affirming *In re Podolin*, 205 Fed. 563), and *In re Podolin*, 202 Fed. 1014, it was held that involuntary bankrupts, even though at the time under indictment for misuse of the mails (mailing false financial statements), were bound to *file schedules* of assets and liabilities *up to the point where they claimed the information would tend to incriminate*, and leave to the court the judgment as to whether answers to the questions they failed to supply were subject to immunity.

The same ruling should apply to tax returns. The taxpayer could be permitted to leave unanswered any question the answer to which he believed incriminating. When thereafter called upon by the revenue officials to supply the missing information by the appropriate mode of procedure (subpœna under Sections 1308 and 1310 (a) of the Revenue Act of 1921 and Section 3173 R. S. as amended by Section 1311 of the same Act), the taxpayer could respond and then claim his privilege after being sworn. In this way full room would be left for the operation of the Fifth Amendment and a taxpayer would be deprived of none of his

rights. A tax return so prepared might be meager and unsatisfactory, but the taxpayer would at least have complied with the requirements of the Revenue Acts up to the point where he could secure a ruling on his constitutional privilege, and the sovereign would not be denied its right of having returns filed from all taxpayers within a certain class.

III

THE QUESTION OF IMMUNITY UNDER THE FIFTH AMENDMENT HAS NOT BEEN PROPERLY RAISED

Although respondent when asked orally for information about his affairs subsequent to the date when his return should have been filed, refused to give any information on the ground that it might incriminate him, the question of self-incrimination was not raised in any way or form at the time his return should have been filed, nor was it raised in the District Court. It was not mentioned until the case reached the Circuit Court of Appeals. In the District Court respondent took the stand in his own behalf and voluntarily testified to the nature of his violations of the National Prohibition Act in an effort to establish the fact that he had made no profits in his lawbreaking and therefore had no income to return. Under these circumstances the question of self-incrimination is not properly in the case at bar. On this point it suffices to quote the following statement of this Court in *United States ex rel. Vajtauer* v. *The Commissioner of*

Immigration (No. 111, October Term, 1926, decided January 3, 1927):

> It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, *Mason* v. *United States*, 244 U. S. 362, a determination which it cannot make if not advised of the contention. Cf. *In re Edward Hess & Co.*, 136 Fed. 988; *Ex parte Irvine*, 74 Fed. 954, 960. The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. See *In re Knickerbocker Steamboat Co.*, 139 Fed. 713; *United States* v. *Skinner*, 218 Fed. 870, 876; *United States* v. *Elton*, 222 Fed. 428, 435.

IV

STATUTORY IMMUNITY FROM PROSECUTION FOR INCRIMINATING DISCLOSURES IN TAX RETURNS IS NOT NECESSARY TO THE RIGHT TO REQUIRE THE FILING OF SUCH RETURNS, SINCE THEY ARE PUBLIC RECORDS REQUIRED BY LAW TO BE MADE

It is conceded that Section 3167 of the Revised Statutes as amended by Section 1311 of the Revenue Act of 1921, does not extend to one making incriminating disclosures in tax returns immunity coextensive with the protection afforded by the Fifth Amendment. But from this it does not follow, as the court below assumed, that the law requiring such return is in conflict with the Fifth Amendment.

A tax return is nothing other than an official record upon which a taxpayer is required by law to state the account for taxes between himself and his Government. It is thus clearly impressed with a public interest or quality. The rule that protection against self-incrimination does not apply to public records is well established. It is equally well established that the same rule applies to records required by law to be kept by private citizens for some governmental purpose. Wigmore on Evidence, 2d Ed., Vol. 4, Sec. 2259 (c).

Such an exception to the application of the Fifth Amendment is recognized in the leading case of *Boyd* v. *United States*, 116 U. S. 616. There this Court, after pointing out the analogy between the Fourth and Fifth Amendments and the object of both to protect the citizen from compulsory testimony against himself, stated that there were necessarily excepted therefrom certain articles, writings, or things, and particular mention was made of the manufacture or custody of excisable articles "and the entries thereof in books required by law to be kept for * * * inspection" (p. 623).

Again in *Wilson* v. *United States*, 221 U. S. 361, where the right was sustained to compel a corporate official to produce corporate books over his personal objection that they would incriminate him the same as if they were his own, this Court discussed the rule respecting public records and stated that the principles applied not only to public documents in public offices—

> * * * but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, can not be maintained. (Page 380.)

In support of the above statement this Court cited with approval such cases as *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666 (reversed on another point in 117 Mo. 614). In the former there was a statute requiring the defendant, who was a druggist, to keep a record of his sales of intoxicating liquors, and in the latter there was a requirement that a druggist should preserve prescriptions compounded by him. These, manifestly, were not corporate records or documents in public offices, yet the public interest in the citizen's private business had resulted in the enactment of statutes requiring the keeping of records which thereby became impressed with such a public character as to require their production and use over the objection of self-incrimination. See also *State* v. *Davis*, 68 W. Va. 142; *People* v. *Coombs*, 158 N. Y. 532; *L. & N. R. R. Co.* v. *Commonwealth*, 21 Ky. L. 239; *State* v. *Smith*, 74 Ia. 580; *State* v. *Cummins*, 76 Ia. 133; *People* v. *Henwood*, 123 Mich. 317; *Langdon* v. *People*, 133 Ill. 382. See *contra*, *State* v. *Pence*, 173 Ind. 99. In the *Pence case*, however, the ground of the court's decision was that there was no provision of the statute making a druggist's

records public records. In the instant case tax returns are made public records by Section 257 of the Revenue Act of 1921, *supra*.

Federal cases to the same effect are *United States* v. *Sherry*, 294 Fed. 684, and *United States* v. *Mulligan*, 268 Fed. 893. The *Sherry case* involved the provision of the Harrison Anti-Narcotic Act requiring a dealer to preserve prescriptions for a period of two years. The court propounded the question as to whether or not the documents were of a character which subjected them to the scrutiny demanded and asked "Did the custodian voluntarily assume a duty which overrides his claim of privilege?" Whereupon the court, applying the principles of the *Wilson case*, *supra*, declared the question must be answered in the affirmative.

The *Mulligan case*, *supra*, arose under the Lever Act and involved the production of books and papers which the defendant was compelled to keep under the statute as a condition of doing business. There, over objection, the court invoked the rule of the *Wilson case*, *supra*, and held that such records were not within the protection of the Fifth Amendment. While this Court subsequently, in *United States* v. *Cohen Grocery Company*, 255 U. S. 81, held a portion of the Lever Act invalid, it was not upon any point discussed in the *Mulligan case*, and such holding does not militate against the reasoning of the court in that case upon the doctrine declared in the *Wilson case*.

It may be objected that the cases so far cited relate to public records already in existence, while in the case at bar we are concerned with records not yet made and which it is sought to require the taxpayer to bring into existence. The rule, however, goes that far.

In *People* v. *Rosenheimer*, 209 N. Y. 115, the defendant was indicted for violation of a section of the State highway law which punished failure to stop and report name, residence, operator's license, etc., to the injured party after an accident had occurred. Immunity against self-incrimination was pleaded. After stating (p. 119) that the statute undoubtedly required the defendant "to make known a fact which will be a link in the chain of evidence to convict him of crime, if in fact he has been guilty of one," the court upheld the right to compel the required report and went on to say (p. 120):

> Physicians are required to report deaths and their causes, druggists the sale of poisons, and failure to comply with these requirements is made a misdemeanor. (Penal Law, sec. 1743; Pub. Health Law, Sec. 235.) The Labor Law (Section 87) requires a person in charge of any factory to report to the commissioner of labor all deaths, accidents or injuries and the details thereof. Compliance with any of these statutory regulations may, in the case of the commission of a crime by the person who is required to make the certificate or registry, prove an

important factor in leading to his detection, but this is not sufficient to render the legislation invalid. Whether, as claimed by the respondent's counsel, the statute before us goes so much further in the way of self-incrimination as to render the illustrations referred to inapplicable, it is not necessary to definitely determine.

In *State* v. *Hanson*, 16 N. D. 347 (reversed on another point in 215 U. S. 515), the court upheld over a claim of immunity against self-incrimination the commitment of defendant in default of bail to answer to the charge of neglecting to register and publish a receipt issued to him by the United States for payment of the internal revenue tax upon the occupation of a retail liquor dealer despite the fact that such occupation was prohibited by the State. See also *Ex parte Knoedler*, 243 Mo. 632; *State* v. *Sterrin*, 78 N. H. 220; *People* v. *Diller*, 24 Cal. App. 799; *Woods* v. *State*, 15 Ala. App. 251.

In *United States* v. *Sischo*, 262 U. S. 165, it was decided that a master or owner of a vessel was required to list on his manifest smoking opium despite the fact that its importation was prohibited by penalty and forfeiture. The court below had held that such opium was not required to be listed on the manifest because it was not "merchandise" within the meaning of that word. The case was first affirmed by an equally divided court, (260 U. S. 697), but upon petition for rehearing (260 U. S. 701) it was reargued and reversed by

a unanimous court. In its opinion this Court said (p. 167):

> The collection of duties is not the only purpose of a manifest, as is shown by the requirement of one for outward bound cargoes and from vessels in the coasting trade bound for a port in another collection district, Rev. Stats. secs. 4197, 3116, and more clearly by the plain reason of the thing. A Government wants to know, without being put to a search, what articles are brought into the country, and to make up its own mind not only what duties it will demand but whether it will allow the goods to enter at all. It would seem strange if it should except from the manifest demanded those things about which it has the greatest need to be informed—if in that one case it should take the chance of being able to find what it forbids to come in, without requiring the master to tell what he knows. It would seem doubly strange when at the same time it required any other person who had knowledge that the forbidden article was on the vessel to report the fact to the master. Act of January 17, 1914, c. 9, sec. 4, 38 Stat. 275, 276. It is not an answer to say that if the master knows that he has contraband goods on board he is subject to a penalty for that and probably will lie. The law naturally, one would think, would put the screws on to make him tell the truth, and in that way diminish the chance of his carrying contraband and help him to show his innocence if he has made a mistake. *Harford* v. *United*

> *States*, 8 Cranch, 109. We are of opinion that this policy, which has been expressed in terms in later statutes, (Act of May 26, 1922, c. 202, sec. 3, 42 Stat. 596, 598; Tariff Act of September 21, 1922, c. 356, secs. 401(c), 431, 584, 42 Stat. 858, 948, 950, 980;) governs also in the statutes to be construed here.

While the question of incrimination was not directly ruled upon by the court in the *Sischo case*, it can not be said that this Court overlooked the effect of the Constitution upon the law requiring the manifest of opium because one of the grounds urged in the petition for rehearing was the following (Pet. 6):

> Unless a clear interpretation of the word "merchandise" is secured from this court, we may find bootleggers and rum runners who have amassed considerable fortunes through the sale of prohibited liquor for beverage purposes, contending that they are excused from filing an income-tax return on the ground that the filing of this return would be forcing them to give evidence against themselves of the commission of a crime and pleading the alleged exemption granted them by the Constitution.

Presumably in answer to the above the Court said (p. 167):

> There is less contradiction between the requirement of the manifest and the prohibition of the import than there is between such a prohibition and a tax. *United States* v. *Stafoff*, 260 U. S. 477.

Every constitutional objection which has been marshalled in this case to support respondent's claim of immunity from filing a tax return would apply equally well in the *Sischo case* against the requirement of a manifest of prohibited merchandise.

The *Sischo case* is not in conflict with the principle of the *Boyd case, supra.* In the latter case the paper involved differed totally in character from a manifest. It was an ordinary invoice—in every sense a private paper, being but a record of a private business transaction between private parties. This Court repeatedly emphasized its private character. On the other hand, the manifest in the *Sischo case* is clearly one of those very records required by law to be made for a governmental purpose which the Court in the Boyd case took pains to specifically except from the principle therein enunciated. A tax return, it is submitted, must also fall within the same excepted class of records, since it is essentially the same in character and purpose as a manifest. The customs laws requiring a manifest and the income tax laws requiring a return are strictly *in pari materia.* Generically, they are both revenue laws.

In *Harford* v. *United States,* 8 Cranch 109, cited with approval in the *Sischo case, supra,* it was held that articles whose importation was forbidden were nevertheless subject to the provisions of the customs laws prohibiting unlading without a permit.

In *United States* v. *Dalton,* 286 Fed. 756, it was held that the immunity from being compelled to give incriminating testimony secured by the Fifth Amendment to the Constitution has no application to declarations required on entries of goods under the customs laws.

Marks v. *United States,* 196 Fed. 476, upheld an indictment for manufacturing smoking opium without a license and bond long after the importation of such opium was absolutely forbidden.

The case of *United States* v. *Lombardo,* 228 Fed. 980 (affirmed on other grounds, 241 U. S. 73), relied upon by the court below, is not in point. There the District Court simply held that the immunity provision in the White Slave Act (Sec. 6) was not as broad as the privilege against self-incrimination granted by the Constitution. The question whether or not the report which the law required every person keeping an alien woman for purposes of prostitution to file with the Commissioner of Immigration was in the nature of a public record and therefore not within the protection of the Fifth Amendment was not considered or decided. Moreover the same judge who decided the *Lombardo case*, in deciding in the *Dalton case, supra,* that the Fifth Amendment had no application to the manifests required under the customs laws, stated that his decision in the *Lombardo case* was not in point on that question.

In the instant case the governmental right sought to be enforced is of the very highest—the right

given by the Constitution to lay and collect taxes. The nature of an income tax is such that it could not possibly be properly and fairly collected unless returns were made. The law has prescribed that they shall be made and official forms are distributed to taxpayers for that purpose. The Government has an interest in and a right to such a record from every taxpayer. Unless this is recognized it needs no argument to show that the purpose and operation of the Sixteenth Amendment and the laws carrying it into effect will be embarrassed, if not to a considerable extent defeated. There is no reason in law or logic which should require the making or production of the records involved in the cases cited—ships' manifests, for example, in the *Sischo case* and customs declarations in the *Dalton case*—and at the same time excuse the filing of a tax return expressly required by law for the purpose of stating the account for taxes between a taxpayer and his government, whether or not the income is derived from illegal sources. To hold otherwise would be to discriminate in favor of the law violator. Since the Circuit Court of Appeals makes no distinction between the return of a taxpayer all of whose income is derived from an unlawful source and one only part of whose income is derived from an unlawful source (in the instant case the facts show that respondent had income from both lawful and unlawful sources), a consequence of the decision below is that no person any part of whose income is derived from criminal operations need file any

return. The far-reaching effect of such a ruling upon the collection of taxes is apparent without argument. In effect the Government's right to collect its taxes would be at the mercy of the lawbreaker.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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APRIL, 1927.

41324—27——5

APPENDIX

Privy Council Appeal No. 119 of 1925.

The Minister of Finance, appellant; Cecil R. Smith, respondent.

From the Supreme Court of Canada. Judgment of the Lords of the Judicial Committee of the Privy Council delivered the 27th July, 1926.

Present at the hearing: Viscount Haldane, Lord Atkinson, Lord Darling, Lord Justice Warrington.

(Delivered by Viscount Haldane.)

This is an appeal from a judgment of the Supreme Court of Canada which had reversed the judgment of the Exchequer Court. The decision of the Exchequer Court, which was that of Audette J., was in answer to a question arising on a special case stated by direction of the Court itself, on an appeal by the respondent under the provisions of the Income War Tax Act, 1917, of the Dominion, as amended by subsequent legislation. This question was raised upon the narrative that the respondent Smith had, during the year 1920, gained certain profits within the Province of Ontario by operations in illicit traffic in liquor contrary to the existing Provincial legislation in that respect. Upon these profits Smith had been assessed for Income Tax, pursuant to the Income War Tax Act, 1917, and the amendments thereto. The validity of the assessment, in so far as it included the said profits as a basis for computing the tax as assessed, was in dispute. The question for the opinion of the

Court was: "Are the profits arising within Ontario from the illicit traffic in liquor therein, contrary to the provisions of the said existing Provincial legislation in that respect 'income' as defined by s. 3, ss. 1, of the Income War Tax Act, 1917, and amendments thereto, and liable to have assessed, levied and paid thereon and in respect thereof the taxes provided for in the said Act." On this question the Exchequer Court decided that the profit arising from the illicit traffic within Ontario was income taxable under the Dominion statutes referred to, and dismissed an appeal brought to it by the respondent Smith.

The power of the Dominion Parliament to tax income is exercised under subhead 3 of Section 91, of the British North America Act, 1867. This extends to the raising of money by any mode or system of taxation. The Dominion Parliament is in such a matter of taxation *quasi* sovereign, and it is not open to serious doubt that under Section 91 the Dominion Parliament could tax the profits in question if it thought fit to do so, or that the fact that they arose from operations in traffic in liquor made illicit by the Provincial legislation of a Province constitute no hindrance to such taxation, if the Dominion Parliament had clearly directed it to be imposed. The only real question is one of construction, whether words have been used which impose a tax in such a case.

Section 3 of the Income War Tax Act, 1917, defines income as including the annual net profit or gain or gratuity being profit from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any trade, manufacture or business as the case may be,

whether derived from sources within Canada or elsewhere, and as including the indirect profits or dividends directly or indirectly received from money at interest upon any security or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the profit or gain from any other source. Section 4 imposes income tax upon the income so defined of any person carrying on business in Canada. The respondent was engaged during the year 1920 in illicit traffic in liquors in Ontario, contrary to the provisions of the Ontario Temperance Act and the amendments thereto, and the question is whether the Parliament of Canada has enacted that he is to be taxed on the profits from this.

In the Exchequer Court, Audette J. said that trading in liquor is not illicit or illegal at common law, and not *malum in se* but only *malum prohibitum*, and is not a criminal offence. It was, however, illicit and illegal by the laws of Ontario, and the present respondent could not invoke his own turpitude to claim immunity from paying taxes, and ask for discrimination in his favour, increasing the amount which might have to be levied on honest traders. It was not necessary to enquire, he added, into the source from which his revenue was derived, for the tax was by Section 4 of the Taxing Act imposed on the person. The illicit traffic in question was not a criminal offence in itself, and while illegal in Ontario, might not be so in other parts of Canada. The Provincial legislation could not derogate from the right of the Dominion under its Taxing Act, and the profits in question came within the ambit of the definition of income in that Act.

The Supreme Court took a different view. The learned Judges of that Court thought that such a business as that of the present respondent ought to be strictly suppressed, and that it would be strange if under the general terms of the Dominion statute the Crown could levy a tax on the proceeds of a business which a Provincial legislature, in the exercise of its constitutional powers, had prohibited within the Province. They held that the power, given to the Dominion Minister, by Section 7, to call for a return of the taxpayer's income vouched by documents and in detail, and for records which he was to keep, could be construed only as relating to what was legal, and could not extend to gains from crimes. They therefore allowed the appeal. Idington J. added that the "Bootleggers," as the profiteers under the Ontario Temperance Act had been called, were well known before the Taxing Act became operative, and that it was to be expected that if it had been intended to apply that Act to them express or very clear language would have been used. The judgment of the Exchequer Court was accordingly reversed, and this appeal is the result.

Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and

divergent laws of the particular Provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

There are certain expressions at the end of the judgment of Scrutton L. J., in *Inland Revenue Commissioners* v. *Von Glehn* (1920, 2 K. B. 553) as to the scope of the British Income Tax Acts. Their Lordships have no reason to differ from the conclusion reached in that case, but they must not be taken to assent to any suggestion sought to be based on the words used by the learned Lord Justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only. So far as Parliaments with sovereign powers are concerned, they need not be so. The question is never more than one of the words used.

They will humbly advise His Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside with costs and the judgment of the Exchequer Court restored.

The respondent will pay the costs of the appeal.

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Form 1126
U. S. INTERNAL REVENUE

CERTIFICATE OF INVENTORY

(To be filed with Collector of Internal Revenue with Income Tax Return)

FOR CALENDAR YEAR 1921

Or for period begun ....., 19....., *and ended* ....., 19.....

Name .....

Address .....

PRINCIPAL CERTIFICATE

Number of sheets submitted herewith.....

I swear (or affirm) that the closing inventory of the taxpayer named above, amounting to $....., was taken under my direction, and that to the best of my knowledge and belief is true and complete in every respect; that the method of pricing the raw material, work in process, and finished goods was at * .....; that I have carefully read all of the instructions on the reverse side of this form; that this inventory was taken in accordance therewith; and that the following-named persons whose separate certificates are subscribed hereon or attached hereto are the officers and employees under whose personal direction the various parts of this inventory were taken:

Name.	*Title or position.*	*Part of inventory taken.*	*Amount.*
			$
			$
			$
			$
			$
			$
			$

Sworn to and subscribed before me this ..... day of ....., 19.....

(Signature.)

(Signature of officer administering oath.) (Title.) (Title.)

*State "cost" or "cost or market, whichever is lower." If any other basis was used, describe fully, state why used and date on which inventory was last reconciled with stock.

SUBSIDIARY CERTIFICATE

I (or we), the undersigned employees of the taxpayer named above swear (or affirm) that I (or we) personally directed and observed the taking of the parts of the inventory set opposite my (or our) names, and, to the best of my (or our) knowledge and belief, is true and complete in every respect; that I (or we) have carefully read the instructions on the reverse side of this form and that the parts of the inventory for which I am (or we are) responsible was taken in accordance therewith.

Signature.	*Title or position.*	*Part of inventory taken.*

Sworn to and subscribed before me this ..... day of ....., 19.....

(Signature of officer administering oath.) (Title.)

INSTRUCTIONS.

This certificate of inventory must be submitted by all taxpayers engaged in a trade or business in which the production, purchase, or sale of merchandise of any kind is an income-producing factor.

The principal certificate will be signed by the taxpayer or an executive officer and the subsidiary certificate by officers and employees (such as department heads, superintendents, etc.) designated by the taxpayer or executive officer. If the taxpayer who fills in the principal certificate actually directs and observes the taking of the inventory, the subsidiary certificate need not be filled in.

In case there is not sufficient space on this form to enter the names of those directed to take the inventory, or it is not convenient for them to take the oath jointly, additional copies of this form should be used, but the oath of the principal officer need only be made on the first sheet, stating thereon the number of sheets submitted.

If the return has already been filed, the certificate should be sent to the collector of the district in which the return was filed.

SECTION 203 OF THE REVENUE ACT OF 1921.

That whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

EXTRACTS FROM REGULATIONS 62.

ART. 1581. **Need of inventories.**—In order to reflect the net income correctly, inventories at the beginning and end of each year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor. The inventory should include raw materials and supplies on hand that have been acquired for sale, consumption, or use in productive processes, together with all finished or partly finished goods. Only merchandise title to which is vested in the taxpayer should be included in the inventory. Accordingly the seller should include in his inventory goods under contract for sale but not yet segregated and applied to the contract and goods out upon consignment, but should exclude from inventory goods sold, title to which has passed to the purchaser. A purchaser should include in inventory merchandise purchased, title to which has passed to him, although such merchandise is in transit or for other reasons has not been reduced to physical possession, but should not include goods ordered for future delivery transfer of title to which has not yet been effected.

ART. 1582. **Valuation of inventories.**—The act provides two tests to which each inventory must conform: (1) It must conform as nearly as may be to the best accounting practice in the trade or business, and (2) it must clearly reflect the income. It follows, therefore, that inventory rules can not be uniform but must give effect to trade customs which come within the scope of the best accounting practice in the particular trade or business. In order to clearly reflect income, the inventory practice of a taxpayer should be consistent from year to year, and greater weight is to be given to consistency than to any particular method of inventorying or basis of valuation so long as the method or basis used is substantially in accord with these regulations. An inventory that can be used under the best accounting practice in a balance sheet showing the financial position of the taxpayer can, as a general rule, be regarded as clearly reflecting his income.

The basis of valuation most commonly used by business concerns and which meets the requirements of the Revenue Act is (*a*) cost or (*b*) cost or market, whichever is lower. (For inventories by dealers in securities, see article 1585.) Any goods in an inventory which are unsalable at normal prices or unusable in the normal way because of damage, imperfections, shop wear, changes of style, odd or broken lots, or other similar causes, including secondhand goods taken in exchange, should be valued at bona fide selling prices less cost of selling whether basis (*a*) or (*b*) is used, or if such goods consist of raw materials or partly finished goods held for use or consumption, they should be valued upon a reasonable basis, taking into consideration the usability and the condition of the goods, but in no case shall such value be less than the scrap value.

Bona fide selling price means actual offerings of goods during a period ending not later than 30 days after inventory date.

The burden of proof will rest upon the taxpayer to show that such exceptional goods as are valued upon such selling basis come within the classifications indicated above, and he shall maintain such records of the disposition of the goods as will enable a verification of the inventory to be made.

In respect to normal goods whichever basis, (*a*) or (*b*) is adopted must be applied with reasonable consistency to the entire inventory. Taxpayers were given an option to adopt the basis of either (*a*) cost or (*b*) cost or market, whichever is lower, for their 1920 inventories, and the basis adopted for that year is controlling, and a change can now be made only after permission is secured from the Commissioner. Goods taken in the inventory which have been so interrungled that they can not be identified with specific invoices will be deemed to be either (*a*) the goods most recently purchased or produced, and the cost thereof will be the actual cost of the goods purchased or produced during the period in which the quantity of goods in the inventory has been acquired, or (*b*) where the taxpayer maintains book inventories in accordance with a sound accounting system in which the respective inventory accounts are charged with the actual cost of the goods purchased or produced and credited with the value of goods used, transferred, or sold, calculated upon the basis of the actual cost of the goods acquired during the taxable year (including the inventory at the beginning of the year) the net value as shown by such inventory accounts will be deemed to be the cost of the goods on hand. The balances shown by such book inventories should be verified by physical inventories at reasonable intervals and adjusted to conform therewith.

Inventories should be recorded in a legible manner, properly computed and summarized, and should be preserved as a part of the accounting record of the taxpayer. The inventories of taxpayers on whatever basis taken will be subject to investigation by the Commissioner, and the taxpayer must satisfy the Commissioner of the correctness of the prices adopted.

The following methods, among others, are sometimes used in taking or valuing inventories, but are not in accord with these regulations, viz:

(*a*) Deducting from the inventory a reserve for price changes, or an estimated depreciation in the value thereof.
(*b*) Taking work in process, or other parts of the inventory, at a nominal price or at less than its proper value.
(*c*) Omitting portions of the stock on hand.
(*d*) Using a constant price or nominal value for a so-called normal quantity of materials or goods in stock.
(*e*) Including stock in transit, either shipped to or from the taxpayer, the title of which is not vested in the taxpayer.

ART. 1583. **Inventories at cost.**—Cost means:

(1) In the case of merchandise on hand at the beginning of the taxable year, the inventory price of such goods.

(2) In the case of merchandise purchased since the beginning of the taxable year, the invoice price less trade or other discounts, except strictly cash discounts, approximating a fair interest rate, which may be deducted or not at the option of the taxpayer, provided a consistent course is followed. To this net invoice price should be added transportation or other necessary charges incurred in acquiring possession of the goods.

(3) In the case of merchandise produced by the taxpayer since the beginning of the taxable year, (*a*) the cost of raw materials and supplies entering into or consumed in connection with the product, (*b*) expenditures for direct labor, (*c*) indirect expenses incident to and necessary for the production of the particular article, including in such indirect expenses a reasonable proportion of management expenses, but not including any cost of selling or return on capital, whether by way of interest or profit.

(4) In any industry in which the usual rules for computation of cost of production are inapplicable, costs may be approximated upon such basis as may be reasonable and in conformity with established trade practice in the particular industry. Among such cases are (*a*) farmers and raisers of live stock (see article 1586), (*b*) miners and manufacturers who by a single process or uniform series of processes derive a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike (see article 1587), and retail merchants who use what is known as the "retail method" in ascertaining approximate cost. (See article 1588.)

ART. 1584. **Inventories at market.**—Under ordinary circumstances, and for normal goods in an inventory, "market" means the current bid price prevailing at the date of the inventory for the particular merchandise in the volume in which usually purchased by the taxpayer, and is applicable in the cases (*a*) of goods purchased and on hand, and (*b*) of basis elements of cost (materials, labor, and burden) in goods in process of manufacture and in finished goods on hand; exclusive, however, of goods on hand or in process of manufacture for delivery upon firm sales contracts (i. e., those not legally subject to cancellation by either party) at fixed prices entered into before the date of the inventory, which goods must be inventoried at cost. Where no open market exists or where quotations are nominal, due to stagnant market conditions, the taxpayer must use such evidence of a fair market price at the date or dates nearest the inventory as may be available, such as specific purchases or sales by the taxpayer or others in reasonable volume and made in good faith, or compensation paid for cancellation of contracts for purchase commitments. Where the taxpayer in the regular course of business has offered for sale such merchandise at prices lower than the current price as above defined, the inventory may be valued at such prices less proper allowance for selling expense, and the correctness of such prices will be determined by reference to the actual sales of the taxpayer for a reasonable period before and after the date of the inventory. Prices which vary materially from the actual prices so ascertained will not be accepted as reflecting the market.

ART. 1585. **Inventories by dealers in securities.**—A dealer in securities who in his books of account regularly inventories unsold securities on hand either (*a*) at cost or (*b*) at cost or market, whichever is lower, or (*c*) at market value, may make his return upon the basis upon which his accounts are kept; provided that a description of the method employed shall be included in or attached to the return, that all the securities must be inventoried by the same method, and that such method must be adhered to in subsequent years, unless another be authorized by the Commissioner. For the purpose of this rule a dealer in securities is a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation, and not in the course of an established business, and officers of corporations and members of partnerships, who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule. A dealer in securities is not entitled to the benefits of section 206 with reference to the gain from the sale of securities.

ART. 1586. **Inventories of live-stock raisers and other farmers.**—(1) Farmers may change the basis of their returns from that of receipts and disbursements to that of an inventory basis, which necessitates the use of opening and closing inventories for the year in which the change is made. There should be included in the opening inventory all farm products (including live stock), purchased or raised, which were on hand at the date of the inventory, but inventories must not include real estate, buildings, permanent improvements, or any other assets subject to depreciation.

(2) Because of the difficulty of ascertaining actual cost of live stock and other farm products, farmers who render their returns upon an inventory basis may at their option value their inventories for the current taxable year according to the "farm-price method" which provides for the valuation of inventories at market price less cost of marketing. If the use of the "farm-price method" of valuing inventories for any taxable year involves a change in method of pricing inventories from that employed in prior years, the opening inventory for the taxable year in which the change is made should be brought in at the same value as the closing inventory for the preceding taxable year. If such valuation of the opening inventory for the taxable year in which the change is made results in an abnormally large income for that year, there may be submitted with the return for such taxable year an adjustment statement for the preceding year based on the "farm-price method" of valuing inventories; upon the amount of which adjustments the tax, if any be due, shall be assessed and paid at the rate of tax in effect for such preceding year.

(3) Where returns have been made in which the taxable net income has been computed upon incomplete inventories, the abnormality should be corrected by submitting with the return for the current taxable year a statement for the preceding year in which such adjustments shall be made as are necessary to bring the closing inventory for the preceding year into agreement with the opening complete inventory for the current taxable year. If necessary to reflect the income, similar adjustments may be made as at the beginning of the preceding year, and the tax, if any be due, shall be assessed at the rate of tax in effect for such year.

ART. 1587. **Inventories of miners and manufacturers.**—A taxpayer engaged in mining or manufacturing who by a single process or uniform series of processes derives a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike, and who in conformity to a recognized trade practice allocates an amount of cost to each kind, size, or grade of product which in the aggregate will absorb the total cost of production, may use such allocated cost as a basis for pricing inventories, provided such allocation bears a reasonable relation to the respective selling values of the different kinds of product.

ART. 1588. **Inventories of retail merchants.**—Retail merchants who employ what is known as the "retail method" of pricing inventories may make their returns upon that basis, provided that the use of such method is designated upon the return, that accurate accounts are kept, and that such method is consistently adhered to unless a change is authorized by the Commissioner. Under this method the goods in the inventory are ordinarily priced at the selling prices and the total retail value of the goods in each department or of each class of goods is reduced to approximate cost by deducting the percentage which represents the difference between the retail selling value and the purchase price. This percentage is determined by departments of a store or by classes of goods, and should represent as accurately as may be the amounts added to the cost prices of the goods to cover selling and other expenses of doing business and for the margin of profit. In computing the percentage above mentioned, proper adjustment should be made for all mark-ups and mark-downs.

A taxpayer maintaining more than one department in his store or dealing in classes of goods carrying different percentages of gross profit should not use a percentage of profit based upon an average of his entire business, but should compute and use in valuing his inventory the proper percentages for the respective departments or classes of goods.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 851.

UNITED STATES OF AMERICA, PETITIONER,

versus

MANLY S. SULLIVAN, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

No opinion was rendered by the District Court, sitting at Charleston. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 15 F. (2d) 809.

JURISDICTION.

The judgment of the Circuit Court of Appeals to be reviewed was entered October 25, 1926. (R. 117.) Petition for certiorari was filed January 25, 1927, under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936). The Petition was granted March 7, 1927.

QUESTIONS PRESENTED.

This case involves the following questions:

I. Does not Section 223 of the Revenue Act of 1921, so far as it requires a return from one whose income is derived from a violation of the Criminal Law, conflict with that provision of the Fifth Amendment that no person shall be compelled, in any criminal case, to be a witness against himself?

II. Did Congress intend the direct proceeds of crimes against the laws of the United States to be considered as income within the meaning of the Revenue Act of 1921?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

That provision of the Fifth Amendment which states—

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Revenue Act of November 23, 1921.

STATEMENT.

Respondent was, upon his motion, simultaneously, tried upon two indictments in the Eastern District of South Carolina. One indictment charged perjury in connection with an income tax return for the year 1919, in violation of Section 125 of the Criminal Code. The second indictment was divided into three counts. Respondent was tried at the January term, 1926, of the District Court, at Charleston, South Carolina, and was acquitted on the first indictment, and on counts one and two of the second indictment, but was convicted on count three of the second indictment which charged that Respondent did, unlawfully, violate Section 253 of the Act of November 23, 1921, in that for the year 1921 he had a net income in a large amount, to-wit: the sum of Ten Thousand ($10,000.00) Dollars, profits from his automobile agency and from his business of selling illegal beverages, and that he wilfully refused to make any return whatsoever. The only evidence that Respondent received any income or gain for the year 1921 showed that such income or gain, if any, was derived solely from the sale of illegal beverages. There was no testimony of any gain from legitimate sources, and this the Government admitted in its brief in the Circuit Court of Appeals. See pages 32 and 33 of the Government's Brief in the Circuit Court, which states:

> The Transcript of Record shows that the Defendant was engaged in a legitimate business in the year 1919, to-wit: the tractor business as well as he was engaged in an illegitimate business; but the Record does not show *any* legitimate business in which he was engaged during the years 1920 and 1921. The defendant admitted that he was only engaged in an illegitimate business during these two years; *therefore, there is no contention by the Government from any legitimate business on which to live during the year 1921.*

Respondent admits all other allegations in the Government's Statement of the case.

SUMMARY OF ARGUMENT.

POINT I.

Section 223 of the Revenue Act of 1921 in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law is in conflict with the fifth amendment to the Constitution.

POINT II.

The income tax law does not grant immunity from prosecution.

POINT III.

The question of immunity is properly before this court.

POINT IV.

Direct proceeds of crime against the laws of United States cannot be considered as income within the meaning of the income tax law of 1921.

ARGUMENT.

POINT ONE.

Section 223 of the Revenue Act of 1921, in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law, is in conflict with the fifth amendment to the Constitution.

Section 223 of the Revenue Act of 1921 requires a

return under oath showing specifically the items of income. Section 1300 requires the taxpayer to comply with such regulations and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary, may from time to time prescribe. The Commissioner of Internal Revenue, with the approval of the secretary, has promulgated regulations, among which is the requirement that the taxpayer shall state the kind of business in which he is engaged, and such a statement is required by the form of income tax return issued by the Commissioner.

Thus to comply with this law, the defendant in this case must have executed and filed a return in which he must have stated under oath that he was engaged in the business of violating the National Prohibition Act. It would be hard to imagine a more categorically self-incriminating statement. For failing to file such a return, the defendant has been indicted. The *unanimous opinion* of the Circuit Court of Appeals that the filing of such a return would make the defendant a witness against himself in a criminal case within the meaning of the Fifth Amendment to the Constitution must, it is submitted, be sustained.

At the inception of this argument, we are confronted by the fact that in this case, the protection of the Fifth Amendment is being invoked by a confessed violator of the National Prohibition Law, to save him from punishment for having failed to file a return as required by the Income Tax Law. This raises the question whether the criminal is to be exempted from paying income taxes on his criminal gains, while the man engaged in legitimate business shall be compelled to pay such taxes.

Our answer to this question is that in the first place, the protection of the Fifth Amendment would not exempt the citizen from *paying* his income tax, but merely from filing a self-incriminating return. The Income Tax Act itself provides for the assessment and collec-

tion of taxes by governmental agents where a citizen fails to file a return (Section 250 (d)), so that the Act itself provides the machinery for collecting such taxes in a case such as that now before this Court, and the record shows that such machinery was put into operation in this very case. (R. 7.)

In the second place, whether or not the protection of the Fifth Amendment would, as a practical matter, hamper the government in the enforcement of the Income Tax Law, and tend to exempt criminals from the payment of income taxes, it is respectfully submitted that the question here involved is far more deep, fundamental, and far-reaching than the collection of taxes from criminals. It involves one of the fundamental privileges of citizens of this Republic guaranteed by the Constitution itself. It is true that in this case, the privilege happens to be asserted by a confessed violator of the Prohibition Law. This fact makes the case a hard one. The tendency would naturally be to uphold the provisions of the tax law, and to deny protection to the criminal. But it is just such a case that comes within the old maxim that "hard cases make bad law". The fundamental principles involved in this case are far more important than the mere question of taxation. The decision which must be made cannot be limited to criminals and income tax cases. The principle to be established is clear cut and inescapable: Has Congress the power, in view of the Fifth Amendment, to compel a citizen to file with the government a statement under oath of a self-criminating character.

The language of the Fifth Amendment pertinent to this inquiry is:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

The obvious intent of this provision is that no one

shall be compelled to be the means of exposing his own criminality. This privilege is for the protection of the innocent as well as the guilty, and is intended to prevent for all time anything in the nature of inquisitorial proceedings to compel confessions of crime. Such protection is an essential part of the liberties of a free people, and should be jealously guarded from encroachment by the legislative branch of the government.

In *United States* v. *Boyd*, 116 U. S. 616, this Court said, page 632:

> "And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."

In *Counselman* v. *Hitchcock*, 142 U. S. 547, this Court said, in commenting on this provision of the Constitution, page 562:

> "This provision must have a broad construction in favor of the right which it was intended to secure."

Again, in the same opinion, this Court adopted the language of the Massachusetts Court in *Emory's Case*, 107 Mass. 172, quoting from that opinion, page 573, as follows:

> "By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examina-

> tion in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor such disclosure would be an accusation of himself within the meaning of the constitutional provision."

It is submitted that this language is a sound and accurate exposition of the purpose and effect of the Fifth Amendment, and that the instant case comes well within that language.

The decisions of this Court were summarized by Judge Day, then one of the judges of the 6th Circuit, in *McKnight* v. *U. S.*, 115 Fed. 972, at 981:

> "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more zealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the Constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment."

A very pertinent warning against encroachments on this constitutional right was sounded by this Court in the *Boyd case*, *supra*, at page 635:

> "But illegitimate and unconstitutional practices gets their first footing in that way, namely: by silent

approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

This warning is particularly opportune at this time, when the legislative branch of the government, by innumerable laws, is steadily encroaching upon the individual liberties of the citizens of this country. Business and personal conduct are being regulated, supervised and inspected in detail. Reports of all kinds are required to be made, and books to be kept for the inspection of the government. So far have these practices gone, that there is little of either liberty or privacy left to the citizens. Such procedure is bad enough when it violates no positive constitutional safeguard. When it does, as in this case, we respectfully submit that the Court should intervene.

If a private citizen can be compelled to state under oath that he is engaged in an illegal business, and can be compelled to keep records of such business for the inspection of governmental agencies, it is only a step further to require the citizens to keep diaries under oath, showing all their daily activities in regard to any matter within the power of Congress, and to file or submit such diaries to governmental inspection. In short, if the position of the government is approved in this case, will not the foundation be laid for governmental supervision, regulation and abuse similar to that in France and Russia before their revolutions? Will not the path be cleared for whittling away all the constitutional guarantees embraced in the so-called "Bill of Rights"?

The opinion of the Circuit Court of Appeals in this case, holding squarely that Section 223 of the Income Tax Law, as applied to this case, is unconstitutional, is clear and convincing, logically and necessarily following from the authorities there relied upon. The only other opinion which could be found on this point is *Steinberg* v. *U. S.*, 14 Fed. 2nd 564 (Cir. Ct. App., 2nd Cir. 1926). That was a prosecution for filing a false and fraudulent return, the defendant having failed to report income derived from violation of the prohibition law. A conviction was set aside on the ground that certain evidence had been improperly admitted. In a separate concurring opinion, Judge Manton said, page 568:

> "In the case of criminal gains, a taxpayer may refuse to incriminate himself, and the government is powerless in securing the detailed information of his return; for the Fifth Amendment of the Constitution means that a person shall not be compelled when acting as a witness in any investigation, to give testimony that might tend to show that he had committed a crime. *Counselman* v. *Hitchcock*, 12 S. Ct. 195, 142 U. S. 547, 39 L. Ed. 1110. The protection of the Fifth Amendment is not confined to criminal cases, but extends to any investigation by an administrative officer. * * * If the recipient of this kind of income is obliged to make known its amount and the source, when it is received in sufficient sums to be beyond the exempt minimum, he is compelled to state under oath information that he is not obliged to give, if he chooses to exercise his right of protection of the Fifth Amendment."

In *Peacock* v. *Pratt*, 121 Fed. 772 (Cir. Ct. App., 9th Cir. 1903), the income tax law of Hawaii was under consideration. Its possible conflict with various constitutional provisions not involved in that case was urged. The court declared that if the act required the production of evidence in violation of the Fifth Amendment, the taxpayer might invoke that amendment when

called upon to produce such evidence, since the constitutional limitations must be read into the terms of any law that deals with those subjects.

Thus whenever this question has been presented to the courts, the constitutional guarantee has been upheld.

Review of Supreme Court Decisions.

To review the Supreme Court decisions pertinent to this inquiry, the case of *U. S.* v. *Boyd*, 116 U. S. 616 (1885), holds that one cannot be compelled to produce his private books and papers, that this provision should be liberally construed, and warns against stealthy encroachments on this privilege.

Counselman v. *Hitchcock*, 142 U. S. 547 (1891) held that the Fifth Amendment applied to investigations before a grand jury. The opinion in that case is very complete and carefully considered. The court reviewed a number of state decisions limiting the scope of state constitutional provisions similar to this one, rejected the doctrine of these cases, and stated that this provision must have a broad construction in favor of the right which it was intended to secure.

The instant case comes well within the rule of the *Counselman Case*. Section 1300 of the Act of 1921 requires the taxpayer to keep such records and render under oath such statements and returns as may be prescribed. The regulations, though prescribing no particular kind of records, require accounting records sufficient to show gross income, deductions, etc. (Regulation 62, Article 23.) The statute further provides (Act of 1918, Section 1305, not repealed by 1921 Act) that the commissioner or his agent may examine the person rendering the return under oath. The language of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself has re-

ceived a liberal construction, and, as was said in the *Counselman case*, the object of the Fifth Amendment was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony showing that he himself has committed a crime. The requirement that returns showing sources and amounts of income received must be made, makes such returns the first step *in an investigation*. Since all information must be given under oath, it follows that the *taxpayer* becomes a *witness*. Besides the privilege is not limited to testimony as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate (*Boyd* v. *U. S., supra.*)

In Brown v. *Walker*, 161 U. S. 591 (1895), it was held that if the witness is given absolute immunity from prosecution, such immunity meets the requirement of the Amendment, and the witness may be compelled to testify. The Court cited with approval *Emery's Case*, 107 Mass. 172, and *Cullen* v. *Com.*, 24 Gratt. 624, stating that the opinion in the *Counselman Case* placed great reliance on these cases.

In *Hale* v. *Henkel*, 201 U. S. 43 (1905), Hale was summoned as a witness under a *subpoena duces tecum* requiring the production of certain corporate books. He refused to produce them on the ground that they might tend to criminate him. He was informed of the statutory immunity protecting him, so that his personal privilege was not involved. It was held that he must testify. The exact ground of the decision is not entirely clear. It seems to be partly that the term "person" used in the Fifth Amendment would not include a corporation, so that the privilege would not extend to a corporation and partly that the witness here was attempting to assert the privilege to prevent the crimination of

another party, the corporation, while the privilege was a purely personal one, limited to matters which would tend to criminate the witness himself. Both of these propositions are probably sound, and neither have any application to the case now before this court, since the defendant in this case is an individual and asserts the privilege to protect himself against matters tending to criminate himself.

The doctrine of *Hale* v. *Henkel* was extended in *Wilson* v. *U. S.*, 221 U. S. 361 (1910), to compel an officer of a corporation to produce its books although their production would tend to criminate him, and although he was not protected by immunity. The Court relies first on the doctrine that the constitutional privilege does not extend to a corporation, partly on the fact that the corporation offered no objection and asserted no privilege, and partly on a declaration by the Court the privilege did not extend to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.

This doctrine, it is submitted, is an extremely novel one, and one which practically wipes out the constitutional provision. The very purpose of the constitutional provision is to limit the power of Congress so that it cannot do the things forbidden by the Constitution. Under this holding, all that Congress need do is to require records to be kept on subjects within the scope of its powers, to establish restrictions, and such records must be produced, the Fifth Amendment notwithstanding. In short, Congress may, by legislation, nullify the Fifth Amendment.

After citing the cases of *State* v. *Donovan*, 10 N. D. 203, and *State* v. *Davis*, 108 Mo. 666, the first holding that the privilege did not apply to a druggist who was

required by law to keep a record of the sale of intoxicating liquors, the second holding that it did not apply to a druggist who was required by law to preserve prescriptions, the Court said:

> "The fundamental ground of decision in this class of cases is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him."

With all due deference to the learned Justice who wrote this opinion, it is respectfully submitted that this particular language is loose and dangerous. No limit whatever is placed upon the power of the legislature. Just what is meant by the "character" of the books and papers, "and the rules of law applicable thereto" is not clear. No limits are placed upon the power of the "examining authority". In fact, under this language it could be argued that the legislature had unrestricted power to compel the keeping and production of books and papers, and that as to them, the Fifth Amendment has been wiped out.

Even the holding and the language of this case, however, would not cover the facts of the case now before this Court. It would possibly apply to the books and papers required by the Income Tax Law to be kept and produced by the defendant in this case. But he was not charged with having failed to keep or produce books. The charge in the instant case is failure to file a return which would have required him to criminate himself. This case, then, is distinguishable from the *Wilson case*, and it is respectfully submitted that the doctrine of that case should not be extended. The attention of the Court is respectfully called to the clear, well reasoned and vigorous dissent of Mr. Justice McKenna.

In *Baltimore etc. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612 (1910), it was held that a railroad company cannot avoid filing monthly reports as to hours of labor, although they might tend to criminate it. This is within the principle of *Hale* v. *Henkel*, *supra*, that a corporation is not within the protection of the Amendment.

In *U. S.* v. *Sischo*, 262 U. S. 165, (1923), the Fifth Amendment was not considered.

In *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924), the court held a bankrupt protected by this Amendment as to his books and papers, saying that the privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought, but applies wherever the answer might tend to subject to criminal responsibility him who gives it.

This is the most recent pronouncement of the Supreme Court on this point, and it strongly supports our contention.

The government relies upon a number of state and district court decisions. The State court decisions should carry no weight against the decisions of this Court reviewed above.

As to the District Court decisions; two by the same judge, *U. S.* v. *Lombardo*, 228 Fed. 980 (Dist. Ct. W. D. Wash. 1915), and *U. S.* v. *Dalton*, 286 Fed. 756 (Same court 1923), are hard to reconcile. In the former, the defendant was indicted for failure to file a statement required as to keeping alien women for purposes of prostitution. A demurrer to the indictment was sustained on the ground that the requirement was in conflict with the Fifth Amendment. The Court very strongly upholds the inviolability of the Fifth Amendment.

In the latter case, the defendant had failed to declare and enter certain liquor imported in violation of law. The court upheld the requirement, simply saying

the "Fifth Amendment has no application where parties or goods seek admission into the United States", and that the Lombardo case was not in point. This was a district court decision, and gives no evidence of careful consideration.

In *U. S. v. Mulligan*, 268 Fed. 893 (Dist. Ct. N. D. N. Y., 1920), the defendant was indicted under the Lever Act for refusing to allow government agents to inspect his place of business, books, etc. A demurrer was overruled, the court holding that the privilege of the Fifth Amendment did not apply, relying practically entirely on the existence of a state of war to justify a suspension of the Fifth Amendment. In the first place, even a state of war cannot suspend the constitutional guarantees. *U. S. v. Cohen Grocery Company*, 255 U. S. 81. In the second place, it is just exactly against such inquisitorial pryings that this Amendment was directed—prying into places of business, records and books, and demanding reports. It was from these that the citizens of this Republic were to be freed by the Fifth Amendment. It is, therefore, submitted that the holding of this case is unsound, and further that it is not in point with the instant case, where defendant is charged with having failed to sign under oath and file a self-criminating statement.

In *U. S. v. Sherry*, 294 Fed. 684 (Dist. Ct. N. D. Ill., 1923), the defendant was indicted for an alleged violation of the Anti-Narcotic Act. He moved for an order returning to him certain prescriptions taken by government officers from his books. The Act required druggists to preserve such prescriptions for inspection. The motion was denied, the court relying on the *Wilson case*, and declaring that records required by law to be kept are not covered by the Fifth Amendment.

The language of the *Wilson case* relied upon has been discussed above, and it is submitted that this case, too, is not in point, since it involved papers already in existence, and did not require a citizen to sign a sworn statement of his criminality.

The Rule as to Public Records.

The government, in its brief, Point IV, relies largely upon the rule as to public documents, citing Wigmore on Evidence, Sec. 2259 (c). There is a great difference, it is submitted, between public official books, the property of the State, and records required by law to be kept by a private citizen holding no public office. As to the former of these, it might well be urged that by accepting the public office involving the custody of these documents, the official waives his privilege. As to the second, the records are the private papers of a private citizen, and are given a so-called "*quasi*-public" character only by legislative fiat. If such decisions are sound, the constitutional provision is committed to the legislature, and can be done away with at any time by a mere legislative declaration that papers of a particular kind shall be executed and filed.

Attention is called to the fact that not a single Supreme Court case is cited by Wigmore, and that he cites state cases *contra* to his contention. With due respect to Professor Wigmore, it is submitted that his reasoning in regard to the State not requiring the officer to commit the crime and the crime being due to the party's own election is astonishing. We know of no crimes which are compelled by the State, and this reasoning would exempt from the protection of the Fifth Amendment information as to all crimes voluntarily committed.

The quotation from the *Boyd case*, page 51 of the government's brief, related not to the Fifth Amendment, but to unreasonable searches and seizures. It was mere dictum, and the Court cited no authority in support of its statement.

The quotation from the *Wilson case*, page 52 of the government's brief, was also a dictum. The papers involved in that case were the private correspondence of

the corporation, not required by law to be kept. As pointed out above in the discussion of that case, its reasoning and the exact basis of its decision is not clear, but rests largely upon the principle that corporations are not within the protection of the Fifth Amendment. The other cases cited by the government are State decisions, or such Federal decisions as have been discussed herein.

The public official document rule, we submit, is probably sound. Its extension to private records required by law to be kept is unsound, and a dangerous encroachment upon a fundamental constitutional guarantee. But even if sound, it would not cover the facts of this case, since no records in existence are involved. The question is whether a private citizen can be compelled to prepare, execute under oath, and file with the government a statement tending to criminate himself.

The argument of the government that the return could have been so prepared as to have no tendency to criminate himself is, we submit, without merit. If the taxpaper told the truth, as he was bound to do, and stated that his business was the sale of liquor, or "bootlegging", surely he would criminate himself. If he stated it as "beverages" as suggested, which would be a circumvention of the truth to say the least, surely even that would tend to criminate him. In these days of governmental under cover men and intense prohibition activity, such a statement would invite an investigation as to the nature of his so-called "beverages". Furthermore, it is hardly in keeping with a sound public policy for the government itself to advocate that its citizens shall circumvent the truth or shall state anything less than "the truth, the whole truth, and nothing but the truth".

The argument that such a return constitutes a public or *quasi* public document is not sound. In the first place, there is no such document, it never having come into existence. In the second place, under the law, such *return becomes a public record only after the tax thereon*

has been determined by the Commissioner (Sec. 257). Thus when first filed, it is not a public record.

The argument that the taxpayer should have filed some return, omitting whatever tended to criminate him would mean that in this case no return should be filed. There is no evidence that the defendant received any income during 1921 from any source other than the violation of the Prohibition Law. If the requirement of the Income Tax Law as to such income is unconstitutional, such requirement is void, and no return need be filed.

Conclusion.

In conclusion on this point, we submit that the issue is well defined in this case: whether, in view of the Fifth Amendment, a private citizen can be compelled to execute under oath a statement criminating himself, and to file such statement with the government; that such a requirement is neither within the official public document rule, nor within the unsound extension of that rule to cover records "required by law to be kept"; that if the power of Congress in this respect is sustained, the Fifth Amendment will have been entirely nullified. For these reasons, we respectfully submit that the unanimous decision of the Circuit Court of Appeals should be sustained.

Point II.

The Income Tax Law Does Not Grant Immunity From Prosecution.

The government admits in its brief Point IV, page 50, that the Income Tax Law does not extend to one making incriminating disclosures in tax returns immunity coextensive with the protection afforded by the Fifth Amendment. Thus this point needs no argument. Absolute immunity must be afforded.

Counselman v. *Hitchcock*, 142 U. S. 547.
Brown v. *Walker*, 161 U. S. 591.
McCarthy v. *Arndstein*, 266 U. S. 34.

Point III.

The Question of Immunity is Properly Before This Court.

Respondent refused to file an income report for the year 1921, feeling that to do so would subject him to criminal prosecution by the Government (R., 11, 12, 18, 27).

It is true that upon taking the stand in the District Court, Respondent testified to his illicit traffic in liquor. It should be noted, however, that Respondent was not represented by Counsel in this case (R. 4), and further that he was not notified of his constitutional privilege by the Court.

At the time the return in this case should have been filed, if it should have been filed at all, the Respondent was entitled to assert his constitutional guarantee against self-incrimination. The trial in this case took place in 1926, and his testimony in that trial cannot by relation back constitute now a waiver of his constitutional guarantee which he had and asserted by not filing a return. Such constitutional guarantee could be waived only by filing a return without protest. *Evans* v. *O'Connor*, 174 Mass. 287; *People* v. *Lucas*, 78 N. Y. Supp. 578.

Further the Government did not raise this point in the Circuit Court of Appeals and should, therefore, be precluded from raising it now, especially in view of its request in its Petition for *Certiorari* that the far-reaching questions involved be decided.

By virtue of the Act of March 3, 1915, and Section 10 of the Act of February 13, 1925, it is the duty of appellate Courts to consider cases regardless of the form in which they are brought up, and to return such judgment on the record as law and justice require (*Maukey*

v. *Adams*, Circuit Court of Appeals, 5th, No. 4845, decided March 17, 1927, not reported). Also *Robinson* v. *United States*, 290 Fed. 756.

Point IV.

Direct Proceeds of Crimes Against the Laws of United States Cannot be Considered as Income Within the Meaning of the Income Tax Law of 1921.

Section 213 of the Act of 1921 says:

> "Income includes gains, proceeds and income derived from salaries, wages or compensation, personal service * * * of whatever kind and in whatsoever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of an interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatsoever."

As quoted in the Statement of Case by Respondent, the Government in its Brief in the Circuit Court of Appeals, admitted that there was no contention by the Government that the Defendant made *any* money from *any* legitimate business during the year 1921, with which year we only are interested.

The question now is, "Did Congress intend to tax the gains of crime as income under the above Act?"

It is intended by the Government that since the word "lawful" was used at one point in the Revenue Act of October 3, 1913, and has been omitted in subsequent Revenue Acts, that the intent of Congress as to the question, of taxing gains from crimes, is clearly expressed. However, if the Section is read as an entirety and not an isolated point picked out on which to build

an argument, it will be seen that this contention of the Government is hyper-technical.

The Act reads:

> "That subject only to such exemption and deduction as are hereinafter allowed, the net income of a taxable person is included in gains, profits and incomes derived from salaries, wages, or compensation for personal services, of whatever kind, and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property. Also from interest, rent, dividends, securities, or the transaction of any *lawful* business carried on for gain or profit, or gains or profits, and *income derived from any source whatever* * * *."

Clearly the above Act is as all-inclusive as subsequent ones, for immediately following the phrase, "Or the transaction of any *lawful* business carried on for gain or profits", the Act goes on to say, "Or gains or profits and income derived from any source whatever". The fact that one word of a long Act has been dropped cannot furnish a foundation for the argument of the Government. There is nothing to show that this word was not inadvertently dropped or that it was a mere surplusage.

It seems most doubtful that gains from crime could have been intended to be included in the meaning of "income" as used in the Act of 1921. It seems equally doubtful that the word "income", as used in the 16th Amendment, was intended to have any such meaning. The word, as there used, means no more than it does in common speech, and is not to be extended by loose construction. As was said in *Eisner* v. *Macomber* (1920, 262 U. S. 189), while the 16th Amendment gave Congress the power to levy and collect taxes *on incomes from whatever source derived*, without apportionment among

the several States * * * it has been repeatedly held, this did not extend the taxing power to new subjects. Citing *Brushaber v. Union Pacific Rg.*, 240 U. S., p. 1, the Court further said, "It becomes essential to distinguish between what is and what is not income as the term is there used and to supply that distinction as cases arise according to truth and substance, without regard to form. Congress cannot by any definition it might adopt, conclude the matter, since it cannot by legislation alter the Constitution from which alone it derives its power to legislate * * *. "*Income may be defined as the gain derived from capital, from labor, or from both combined*, provided it be understood to include profit gained through a sale or conversion of capital assets." It seems unreasonable that "criminal effort" should be considered as "labor", or that the whiskey purchased for unlawful sale and in which no property right exists (Prohibition Act, Title II, 25) should be considered as "capital".

If the above definition of "income" be sound and it has never been questioned to date, and if the reasoning in regards it be sound, then it follows that such unlawful gains as the evidence tended to show the defendant receiving in 1921, are not income within the meaning of the Act of 1921.

As to this point, the Honorable Charles Hough in the case of *Steinberg v. United States, supra*:

> "That the winnings of a professional gambler, the loot of burglar, the bribes of the dishonest official, the wages of a prostitute or the profits of any criminal commerce should *not* be regarded as income, but should for reasons of public policy be regarded as beneath the contempt of the law, is a proposition *not without attraction*. If they constitute income within the meaning of the law it must follow that in the language of Sec. 214 of the Act, the 'net' or taxable portion thereof must be reached by deduction of 'all the ordinary and necessary expenses paid or incurred during the taxable year in

carrying on trade or business; wherefore, whoever for profit maintains a saloon, brothel, or fence would have good right to claim as lawful deductions those bribes for 'protection' which are a notorious part of the profitable exercise of such vocations. The moral degradation arising from endeavor by law to collect a necessarily lawful tax out of occupations by equal necessity unlawful, corrupting, and immoral *may well give one pause.*"

In the same case the Honorable Martin T. Manton said:

"* * * Again assuming that he was entitled to deduction for ordinary and necessary expenses as provided in Sec. 214 of Act of 1921 is it possible that the Government is to make allowances for expenses and loss sustained in this illegitimate trade. Assuming that bribery was a means of carrying on the trade, is the government to make allowances for bribing its officials? And if the business flourishes is the government to share in his prosperity? It is hard to conceive of Congress ever having had in mind that the government be paid a part of the income, gains, or profits derived from successfully carrying on this crime or entering into a computation with the person engaged in this unlawful business to ascertain how and to what extent he shall be taxed. The criminal code provides punishment for those who violate the Volstead Act and its various provisions, and if severer punishment should be inflicted, it is a matter for Congress to legislate. It is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit so that the government may accept his money for governmental purposes as it accepts the money of the honest merchant taxpayer * * *. Therefore, I conclude that the reversal should also *order the dismissal of the indictment.*"

The learned Judge thus taking the full step on the point contended for and the step which the other Justices in the case seemed seriously to be considering taking.

Further the Supreme Court of Canada interpreting a Statute much like ours has recently held that the gain from bootlegging, carried on in violation of the Ontario Statutes, is not to be considered as income, the Court said:

> "The assertion of such an intention or purpose would be such a novelty in the way of expressing income tax acts here and elsewhere, that *I should expect to find the intention or purpose expressed in such clear and unambiguous terms as the law has uniformly required all tax acts to be so that there can be no doubt as to their meaning.* The rule in that regard is well stated in Hardcastle's Statute Law, 3rd Edition, page 126, as follows: But for certain purposes express language in statute is absolutely indispensable. And of these specified the first named is that of imposing a tax (Indington, J.). The real question, however, is whether we should place on the Statute a construction which implies that Parliament intended to levy this income tax on the proceeds of crime or on the gain derived from a business which cannot be carried on without violating the law. Such a business should be strictly suppressed and it would be strange indeed if under the general term of the statute the Crown in right of the Dominion would levy a tax on the proceeds of a business which a provincial legislature in the exercise of its constitutional powers has prohibited within the province.
>
> "Moreover what may be called the machinery clauses of the Act (Sec. 7 and *seq.*) clearly show that it never was contemplated that an income tax would be levied on the gains derived from illicit business or from the commission of crime. Thus every person liable to taxation must make to the Minister on or about April 30th in each year a return of his total income during the last preceding year. If the Minister, in order to be able to make an assessment or for any other purpose, desires any information or additional information he may demand it by registered letter and the taxpayer is obliged to furnish this information within thirty days. The

Minister may also require the production of any letters, accounts, invoices, statements, books, or other documents or he may have an inquiry made by the officer thereunto authorized by him and if the taxpayer fails or refuses to keep adequate books or accounts for income tax purposes the Minister may require him to keep such records and accounts as he may prescribe. Any information thus obtained is treated as confidential and its divulgement prohibited."

"I think the inference is irresistible that the taxpayers return of income, the additional information which may be demanded by the Minister, the books and accounts which may be inspected, and the accounts and records which the Minister may require the taxpayer to keep are all in respect of businesses which may be legally carried on. It is difficult to conceive of the Minister requiring criminals to furnish information as to profits derived from the commission of crime or demanding from them the keeping of books or records of their illicit and criminal operations. Furthermore, if the gains derived from crime are within the contemplation of a statute then the expenses incurred in making these gains, i. e., in the employment of criminal agents would be chargeable as deductions against these gains and as to all information furnished by the wrongdoer there would be a promise of secrecy for his protection. It is impossible to believe that anything like this was contemplated by the Parliament (Magnault, J.)."

Smith v. *The Minister of Finance*, 2 Dom. Law Rep. (1925) 1137.

While this case was subsequently reversed by a judgment of the Lords of the Judicial Committee of the Privy Council, it, nevertheless, shows that the view contended for has had strong backing by high Courts, both of this Country and of Canada, and it cannot well be said that the contention is without merit.

The opinion of the Privy Council is surprisingly

short, and there is a noticeable paucity of reasoning. The result is reached mainly on the ground that the Prohibition Law, there involved, was not a Dominion Law, but simply a Provincial Law.

The Court says:

> "Construing the Dominion Act literally the profits in question although by the law of the particular Province they are illicit came within the words employed. Their Lordships can find no valid reasoning for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. *Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular Province.*"

Further their Lordships were not confronted by the provision of a Constitutional Amendment which, as hereinafter pointed out, is very pertinent as to the intent of our Congress.

Further Section 1311 of the Act of 1921 provides:

> "It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the U. S. to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer, or producer, visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures or any particular thereof set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstracts or particulars thereof to be seen or examined by any person except as provided by law: * * * and any offense against the foregoing provision shall be a misdemeanor and be punishable by a fine not exceeding

$1,000.00 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the U. S., he shall be dismissed from office or discharged from employment (R. S. 3167 Amd. Rev. Act, 1924, Sec. 1311, 42 Stat. 311-313)."

Now, there are good reasons why the details of a taxpayer's business, if legitimate, should not be revealed, by gatherers of income tax information, but say the information is that the taxpayer is in the "business" of committing crimes against the U. S., is it reasonably to be believed that Congress intended such information to be concealed?

If returns showed that an "expenditure" had been made to bribe an officer of the United States without which the unlawful business could not have been carried on, was it intended that the Revenue agent who revealed the bribery, should thereby commit a crime?

If it was intended that sources of criminal gain and expenditures should be reported such extraordinary consequences follow.

If the criminal gain is income it follows that the criminal taxpayer must be allowed "the ordinary and necessary expenses" of his "business" (Sec. 214).

If the Statute is broad enough to include the gains of criminal operations, it is broad enough to include their expenses and losses. *The principle of construction to be applied, whatever it is, must be consistent.*

Likewise, if the fruits of a successful crime are income, then it follows that the money losses of the unsuccessful sporadic crime, attempted for gain, such as occasional bootlegging, blackmailing, murdering, are losses incurred in a "transaction entered into for profit, though not in connection with the trade or business" and are deductible from the gains of legitimate businesses.

If Congress had such in mind would there not have

been included among the schedule of expenses not deductible, some specifications as to expenditures and losses incurred in the pursuit of crime.

It is obvious that Congress never intended any such thing, and it is most doubtful if the thought of taxing gain from crime ever occurred to them at the passage of the Act. Such an intent to be found must be read in.

Liquor traffic was flourishing at the time the Act was passed and had Congress intended the proceeds of crime to be considered as income, due to the novelty of such an intent, it would surely have used clear and unequivocal language.

Further, an immunity clause sufficient to meet the demands of the Fifth Amendment would have been a part of the Act so as to insure its effective administration and its constitutionality.

It cannot be said that Congress does not well know the necessity of such clauses and especially in the instant case where the question of self-incrimination would of necessity arise.

Since a Statute must be interpreted in such a way as to remove all doubts, if possible, as to the constitutionality of any part of it, the conclusion must be that every part of it should be enforceable, and when it was required that every recipient of income above the exempt minimum should make a detailed return, under oath, showing the sources of that income, *Congress had in mind such income as taxpayers could be compelled, under oath, to explain.*

It is submitted that the question is not whether Congress *can* tax gains from crime or not, but whether it was *intended* that such be done under the statute in question. In fact, the exact interest of many statutes is dubious, and it is the highest duty of the Court to put a proper and sound construction on such statutes. If such construction will avoid "singular results" it is respectfully urged that a logical common sense interpretation is the proper one.

The rule of construction that all reasonable doubts as to what constitutes income must be resolved in favor of the taxpayer and against the Government is well settled.

U. S. v. *Merriam*, 263 U. S. 178.
Gould v. *Gould*, 245 U. S. 151.

Summary of Point IV.

(I). Under the accepted definition of "income", criminal gains cannot be included.

(II). That unless it is clearly and unequivocally the legislative intent to tax gain from crime, such intent must not be read in by "judicial legislation".

(III). That in the instant case to read in such an intent leads not only to remarkable absurdities, but goes to the very constitutionality of the Act.

(IV). That all doubts as to what constitutes income must be resolved in favor of the taxpayer and against the Government.

CONCLUSION.

In final conclusion, it is respectfully submitted that in view of the present menace to all of the constitutional guarantees as evidenced by the effort of the executive branch of the Government to make "stealthy encroachments" upon this fundamental guarantee against self-incrimination, constituting as it does one of the great bulwarks of American liberty and the dangerous tendency of State and lower Federal Court to sustain such encroachments by creating unsound exceptions, it now becomes necessary for this Court to define in unmis-

takable terms, the limits beyond which there can be no legislative or executive encroachment upon such guarantee.

It is further respectfully submitted that a sound construction of the word "income" as used in the Revenue Act of 1921 excludes criminal gains.

WHEREFORE it is respectfully requested that the judgment of the Circuit Court of Appeals be affirmed.

FREDERICH W. ALEY,
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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 851.—October Term, 1926.

The United States of America, Petitioner, *vs.* Manly S. Sullivan.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 16, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

The defendant in error was convicted of wilfully refusing to make a return of his net income as required by the Revenue Act of 1921; November 23, 1921, c. 136, §§223 (a 253; 42 Stat. 227, 250, 268. The judgment was reversed by the Circuit Court of Appeals. 15 F. (2d) 809. A writ of certiorari was granted by this Court.

We may take it that the defendant had sufficient gross income to require a return under the statute unless he was exonerated by the fact that the whole or a large part of it was derived from business in violation of the National Prohibition Act. The Circuit Court of Appeals held that gains from illicit traffic in liquor were subject to the income tax, but that the Fifth Amendment to the Constitution protected the defendant from the requirement of a return.

The Court below was right in holding that the defendant's gains were subject to the tax. By § 213 (a) gross income includes "gains, profits, and income derived from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." These words are also those of the earlier Act of October 2, 1913, c. 16, section II, B; 38 Stat. 114, 167, except that the word 'lawful' is omitted before 'business' in the passage just quoted. By § 600; 42 Stat. 285, and by another Act approved on the same day Congress applied other tax laws to this forbidden traffic. Act of November 23, 1921, c. 134, § 5; 42 Stat. 222, 223. *United States* v. *One Ford Coupé*, 272 U. S. 321, 327. *United States* v. *Staffof*, 269 U. S.

447, 480. We see no reason to doubt the interpretation of the Act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.

As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo*, 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. *Mason* v. *United States*, 244 U. S. 362. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, January 3, 1927. In this case the defendant did not even make a declaration, he simply abstained from making a return. See further the decision of the Privy Council, *Minister of Finance* v. *Smith*, [1927] A. C. 193.

It is urged that if a return were made the defendant would be entitled to deduct illegal expenses such as bribery. This by no means follows but it will be time enough to consider the question when a taxpayer has the temerity to raise it.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.